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Gillian K. Bearns

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NOTES

REAL PROPERTY—*GIULIETTI v. GIULIETTI*—PARTITION BY PRIVATE SALE ABSENT SPECIFIC STATUTORY AUTHORITY

INTRODUCTION

“Partition proceedings can hardly be classed among topics for enlivening discussion, text books say little about them and case books less; they lack the dramatic elements present in crime and tort.”¹ Although partition as a subject matter may lack dramatic elements, the circumstances from which it arises often reveal Shakespearean themes of greed, treachery and hubris. In *Giulietti v. Giulietti*,² the Connecticut Appellate Court was presented with an unusual consolidation of claims for fraud, legal malpractice, breach of fiduciary duty, dissolution of a closely held family corporation, and partition of the land on which that corporation was conducting business.³ The court affirmed the superior court’s order that the land in question be sold at private sale restricting the purchasers to those members of the Giulietti family who would have owned the property legally as tenants in common, absent the fraud and legal malpractice.⁴

The Connecticut Superior Court derived its authority to order a sale of the land from section 52-500 of the Connecticut General Statutes.⁵ However, section 52-500 does not explicitly authorize a court of general jurisdiction to order a *private* sale;⁶ the statute offers only two modes of relief: partition in kind (actual physical divi-

1. William H. Loyd, *Partition*, 67 U. PA. L. REV. 162, 162 (1919).

2. 784 A.2d 905 (Conn. App. Ct. 2001).

3. For purposes of this note, *Giulietti* will serve as a portal to a larger discussion of the remedy of partition by sale and the authority of state courts to order partition by private sale in the absence of explicit statutory mandate.

4. *Giulietti*, 784 A.2d at 934-37.

5. *Id.* at 934.

6. See *infra* note 7 (quoting CONN. GEN. STAT. § 52-500). See also *Giulietti*, 784 A.2d at 935 (stating that “[t]he language of § 52-500 itself is not helpful to a determination of whether a private sale is authorized [because] . . . [j]ust what types of ‘sales’ are contemplated by the statute is not specified.”).

sion) or partition by sale.⁷ On appeal, the defendant challenged the court's authority to order a private, rather than public, sale as a means of effectuating partition where not expressly authorized by statute.⁸

Whether a court of general jurisdiction has the authority to order a private sale in a partition proceeding in the absence of explicit statutory language was an issue of first impression for the Connecticut Appellate Court.⁹ This note will assess the court's analysis in light of the history of partition and inherent powers of equity. Part I addresses the facts presented in *Giulietti*, the superior court's analysis in reaching a decision, and the appellate review. Part II defines and develops partition as both an action and a remedy in American jurisprudence. Part III of this note explores the history of partition, the origins of which, predictably, are rooted in English law. It examines the incorporation of English law, both common and statutory, into American law, and the development of a distinct common law tradition in equity. This historical dalliance will expose the underlying principles of law that gave the Connecticut Appellate Court adequate authority to confirm a judicial order of partition by private sale. Part IV discusses the development of the remedy of partition by sale, focusing on the early Connecticut case law. Part V places the decision in *Giulietti* in the context of two recent partition decisions by the Connecticut Supreme Court, *Delfino v. Vealencis*¹⁰ and *Fernandes v. Rodriguez*,¹¹ to reveal that although there was sufficient equitable authority inherent in an action for partition, as discussed in Part III, the Connecticut Appellate Court was constrained by these prior decisions. Thus the superior court was able to restrict its decision to the specific facts presented in *Giulietti* by using parallel provisions in state probate law. The decision in *Giulietti* permitting a superior court to order a private sale was an equitable remedy intended to give effect to the intent of the grantor in an intergenerational transfer.¹² The decision was carefully tied to the facts to prevent the expansion of the remedy for partition and to limit courts' equitable powers in provid-

7. "Any court of equitable jurisdiction, may upon the complaint of any person interested, order the sale of any property real or personal, owned by two or more persons when, in the opinion of the court, a sale will better promote the interests of the owners." CONN. GEN. STAT. § 52-500(a) (1991).

8. *Giulietti*, 784 A.2d at 934-37.

9. *Id.* at 935.

10. 436 A.2d 27 (Conn. 1980).

11. 761 A.2d 1283 (Conn. 2000).

12. *Giulietti*, 784 A.2d at 936.

ing a remedy.¹³ In the absence of explicit statutory language granting Connecticut superior courts with the power to order private sales in partition actions, this remedy will not be available to petitioners seeking partition and courts will be hesitant to order this remedy unless similar facts are presented.

I. *GIULIETTI V. GIULIETTI*

A. *The Substantive Facts*

John J. Giulietti owned a thirty-two acre parcel of land located at 325 Kelly Road, Vernon, Connecticut, on which was located a mobile home park incorporated as Vernon Village, Inc. The sole shareholders of the corporation were John J. Giulietti (Mr. Giulietti) and his wife, Alma Giulietti.¹⁴ Mr. and Mrs. Giulietti had four children, John L. Giulietti, James Giulietti, Joanne Giulietti Hollis and Anita Giulietti Demoupolos.¹⁵ James worked as the property manager of the mobile home park and was a full-time employee of Vernon Village, Inc.¹⁶ He worked closely with Mr. Giulietti, who apparently “dislike[d] paperwork and the legal aspects of the business.”¹⁷ These matters he left to his oldest son, John L. Giulietti, a Connecticut attorney.¹⁸ Starting in 1981, Attorney Giulietti¹⁹ “handled all the legal matters for the family and the mobile home park business.”²⁰ Anita and Joanne “lived out of state and did not participate substantially in the operation of Vernon Village, Inc.”²¹ James served as president of Vernon Village, Inc. and Attorney Giulietti acted as secretary; Joanne served on the board of

13. The Connecticut Appellate Court’s support for “a court’s having discretion to order a private sale” is circumscribed by the judicial preference for partition in kind and such discretion would only be appropriate because “a private sale . . . is closer in character to a partition in kind.” *Id.* at 935-36.

14. *Giulietti v. Giulietti*, No. X03CV 980492096S, 1999 Conn. Super. LEXIS 3416, at *4 (Conn. Super. Ct. Dec. 15, 1999).

15. *Id.*

16. *Id.* at *3.

17. *Giulietti*, 784 A.2d at 928.

18. Attorney John L. Giulietti was admitted to the Connecticut Bar in 1972. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *2.

19. This note will follow the superior court’s system of differentiating between John J. Giulietti, father, and John L. Giulietti, son. John J. Giulietti, father, will be referred to as “Mr. Giulietti” and John L. Giulietti, his son, will be referred to as “Attorney Giulietti.” *Id.* at *2-3. The appellate court’s opinion is consistent with the superior court’s opinion in this respect with the exception that “Attorney” is not capitalized as a proper noun.

20. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *3.

21. *Giulietti*, 784 A.2d at 917.

directors at various points whereas Anita did not serve in any capacity at any point.²²

In late 1990, Mr. Giulietti, on the advice of the family accountant, instructed Attorney Giulietti to begin transferring property, including 325 Kelly Road and the assets of Vernon Village, Inc., in annual increments to each of the four Giulietti children equally.²³ Mr. Giulietti “envisioned that his sons would continue to earn salaries by running the mobile home park and that otherwise the family assets would be shared by the children equally.”²⁴ Attorney Giulietti took advantage of his father’s trust and through a series of fraudulent agreements, deeds, and conveyances reduced both of his sisters’ shares in the 325 Kelly Road property and in the corporation. He thereby increased his own portion of both the land and the corporation, and, to a lesser extent, that of James.²⁵

James was involved in Attorney Giulietti’s scheme, having persuaded their mother, Alma, to transfer her shares of Vernon Village, Inc. stock to Attorney Giulietti and himself.²⁶ However, the extent of James’ involvement and the level to which he understood the import of his actions are unclear in the record.²⁷ Eventually, the relationship between Attorney Giulietti and James deteriorated to the point where James refused to sign any more documents and, acting in his capacity as president, terminated Attorney Giulietti’s employment with Vernon Village, Inc.²⁸

In what the superior court referred to as a “desperate effort to maintain control,”²⁹ Attorney Giulietti filed a conservatorship petition to have his mother, Alma, declared incompetent to manage her assets, which would have prevented her from using her own independent money to fund the inevitable and imminent lawsuit against him.³⁰ Although the probate court rejected the petition,³¹ this “did

22. *Id.*

23. The purpose was to avoid paying substantial estate taxes by transferring the maximum gift amount allowable by law each year during his lifetime. *Id.*; *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *4.

24. *Giulietti*, 784 A.2d at 917.

25. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *27-28. *See also* *Giulietti*, 784 A.2d at 919 n.8, 922 n.16.

26. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *22.

27. *Giulietti*, 784 A.2d at 921. The appellate court noted that James acted “perhaps believing that attorney Giulietti would arrange for an equal distribution of the family assets.” *Id.* at 921-22.

28. *Id.* at 921, 927. “Attorney Giulietti was successful in having his employment reinstated.” *Id.* at 922 n.17.

29. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *27.

30. *Id.*

cause Mr. Giulietti to finally realize that his son the lawyer had not carried out his wishes.”³² Mr. and Mrs. Giulietti initiated an action sounding in fraud and legal malpractice, “not from any desire for vengeance or damages, but in order to attempt to effectuate Mr. Giulietti’s intent to distribute his land and business equally to his children.”³³ James and Joanne brought the partition action “seek[ing] a reformation of the deeds from Mr. Giulietti to his children such that each child obtains 25% ownership in the 325 Kelly Road property.”³⁴

B. *The Superior Court’s Decision*

In their complaint, James and Joanne requested that the superior court order partition by private sale.³⁵ The superior court held that, under section 52-495 of the Connecticut General Statutes, Joanne and James had an absolute right as tenants in common with Attorney Giulietti and Anita to request partition of the property.³⁶ The superior court determined that the physical attributes of the property made it impracticable or inequitable to make partition in kind and therefore ordered partition by sale under Connecticut General Statute section 52-500.³⁷ The superior court found that a private sale was “warranted in light of the circumstances”³⁸ and ordered that the 325 Kelly Road property be sold at private auction where the only permissible bidders would be the four Giulietti children.³⁹ The circumstances warranting a private auction were the Giulietti family’s desire to continue operating Vernon Village and to maintain family ownership of Vernon Village, Inc., and the fact that the relationship between the land and the business was such that the business would be placed in jeopardy were the land sold to

31. *Giulietti*, 784 A.2d at 921.

32. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *27.

33. *Id.* at *30.

34. *Id.* at *44. Anita was a named defendant in the partition action; however, through direct communications with the superior court, she indicated that her interests were in fact aligned with those of her siblings, James and Joanne. She declined to file as a plaintiff out of fear “of the bullying and voluminous paperwork [her] . . . brother, John L. Giulietti, would subject [her] to.” *Giulietti*, 784 A.2d at 938 n.32.

35. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *44.

36. *Id.* at *48-49. The appellate court stated that “by the plain language of §52-500, a consensus among the parties is not prerequisite to the court’s order of a sale.” *Giulietti*, 784 A.2d at 937.

37. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *50-52.

38. *Id.* at *52.

39. *Id.*

a stranger.⁴⁰ As a further remedy, so as to prevent unjust enrichment of Attorney Giulietti, the superior court imposed a constructive trust on his share of the 325 Kelly Road property.⁴¹ Thus, under the terms of the sale, the amount received for Attorney Giulietti's share was to be distributed equally between Joanne and Anita to compensate them for loss of income during the period in which they owned less than their fair share of the property.⁴²

C. *The Appeal*

In his appeal, Attorney Giulietti claimed that the trial court acted improperly in ordering a private sale limited to his siblings because the trial court was not authorized by section 52-500 of Connecticut General Statutes to order a private sale.⁴³ He also claimed that the court could not order a private sale over his objections merely because the other three parties in interest had requested a private sale.⁴⁴ The appellate court affirmed the superior court's ruling with respect to both issues.⁴⁵

On appeal, the standard of review applied by the appellate court was "whether the [superior] court abused its discretion in ordering a partition by sale."⁴⁶ However, that review was plenary because the superior court's decision relied on statutory interpretation.⁴⁷ Following principles of statutory interpretation, the appellate court "look[ed] to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same subject matter."⁴⁸ The appellate court's treatment of the language of section 52-500⁴⁹ is brief because "[j]ust what types of 'sales' are contemplated by the statute is not specified."⁵⁰ According to the appellate court, the legislative history is no more revealing because none is available.⁵¹ This void forced the appel-

40. *Id.*

41. *Giulietti*, 784 A.2d at 937; *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *57.

42. *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *57.

43. *Giulietti*, 784 A.2d at 933.

44. *Id.*

45. *Id.* at 933, 937.

46. *Id.* at 934.

47. *Id.* (citing *State v. Velasco*, 751 A.2d 800, 807 (Conn. 2000)).

48. *Id.* at 935.

49. *See supra* note 7 (quoting CONN. GEN. STAT. § 52-500(a)).

50. *Giulietti*, 784 A.2d at 935.

51. "Because of the early date of enactment, no legislative history is available."

late court to look at parallel statutes authorizing probate courts to order partition by sale,⁵² either public or private.⁵³

The appellate court noted that probate section 45a-164⁵⁴ is quite similar in structure and application to section 52-500.⁵⁵ This similarity “authorize[d] the Superior Court to make an analogous determination in response to a like request.”⁵⁶ Thus the court’s reliance on parallel authority “[was] appropriate given the facts in this case,”⁵⁷ primarily the “intergenerational transfer of family real property near the end of the grantor’s life.”⁵⁸ In fact, the superior court was constrained by the facts to reach a result consistent with what a probate court might have ordered.⁵⁹ In addition, the supe-

Giulietti, 784 A.2d at 935. The Connecticut Supreme Court has, in the past, relied on references in earlier opinions to the statute. *See, e.g.*, *Fernandes v. Rodriguez*, 761 A.2d 1283 (Conn. 2000). “In Connecticut, an act extending the power of our courts to order a sale in partition proceedings was enacted in 1844.” *Id.* at 1288. Some history of the language of subsequent revisions of the 1844 Act can be gleaned from early case law. *See infra* note 158 and accompanying text. *But see Giulietti*, 784 A.2d at 936 n.31 (noting that the “[l]egislative history associated with later revisions is not substantive and sheds no light on the issue”).

52. CONN. GEN. STAT. § 45a-164 (1991).

53. CONN. GEN. STAT. § 45a-166(a):

The court of probate in ordering a sale under the provisions of sections 45a-164 to 45a-169, inclusive, . . . shall direct whether the sale shall be public or private. If a public sale is directed, the court shall direct the notice thereof which shall be given. If a private sale is directed, the court may, if it appears to be in the best interests of the estate, determine the price and the terms of the sale . . . , as it considers reasonable and advisable.

54. CONN. GEN. STAT. § 45a-164(a):

Upon the written application of the conservator of the estate of any person, guardian of the estate of a minor, administrator or trustee appointed by the court, including a trustee of a missing person, or the executor or trustee under any will admitted to probate by the court, after public notice and other notice which the court may order and after hearing, the court may authorize the sale or mortgage of the whole or any part of . . . any real property in this state of such person, missing person, deceased person or trustee . . . , if the court finds it would be in the best interests of the parties in interest to grant the application.

55. *See supra* note 7 (containing the language of section 52-500 of Connecticut General Statutes).

56. *Giulietti*, 784 A.2d at 936. The similarity in structure and application also makes the absence of language authorizing superior courts to order private sales more obvious and hints at an intentional legislative silence. However, thanks to section 52-500’s negligible legislative history, the issue was decided by the courts, specifically the Connecticut Appellate Court. *Giulietti*, 784 A.2d at 905. *See supra* note 51 and *infra* note 158 and accompanying text (discussing the legislative history of section 52-500).

57. *Giulietti*, 784 A.2d at 936.

58. *Id.*

59. “The statute [section 45a-164(a)] is thus similar in structure to § 52-500, which authorizes the Superior Court to make an analogous determination in response to a like

rior court was bound by two relatively recent Connecticut Supreme Court decisions concerning partition: *Delfino v. Vealencis*⁶⁰ reaffirmed the Connecticut judiciary's commitment to partition in kind, contradicting the more modern trend towards partition by sale;⁶¹ *Fernandes v. Rodriguez*⁶² restricted the superior court's equitable powers in partition, holding that the only remedies available were those articulated by the legislature. Thus the marked absence of language in section 52-500 explicitly authorizing superior courts to order private sales was overshadowed by larger concerns about consistency and equity.⁶³ These decisions left very little room for the superior court in *Giulietti v. Giulietti* to maneuver. However, the narrowness of the decision, based on the specific facts presented and the immediate parallel in probate court, is precisely why the appellate court concluded that "the [lower] court . . . had the authority pursuant to section 52-500 to order that 325 Kelly Road be sold at a private auction rather than at a public sale."⁶⁴

The second claim of Attorney Giulietti's appeal, that he had not requested a private sale, challenges whether the second element of section 52-500—that a sale would be in the best interests of the parties—was met at trial. The appellate court cited the judicial policy of favoring partition in kind over partition by sale; that policy is "founded on the premise that a 'sale of one's property without his consent is an extreme exercise of power warranted only in clear

request." *Giulietti*, 784 A.2d at 936. Despite the permissive rather than mandatory language, this statement reveals some concern for consistency in outcome based on facts.

60. 436 A.2d 27 (Conn. 1980).

61. "Even though most state statutes still give lip-service to a presumption of division-in-kind, a review of the cases reveals that the presumption is rarely honored . . ." Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 764 (2000). "[State courts'] decisions demonstrate a marked preference for judicial sales despite the statutory preference for partitions in kind." Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 856 (1986).

62. 761 A.2d 1283 (Conn. 2000).

63. "Section 52-500, though not specifically authorizing private sales, similarly does not specifically restrict them." *Giulietti*, 784 A.2d at 936. Although the appellate court was conscious of that absence, it repeatedly cites the similarity in structure between section 45a-164 and section 52-500 and the facts of the case as determinative of the outcome. See, e.g., *id.* (noting "[w]e turn to legislation governing the same general subject matter . . ."; "[t]he statute [section 45a-164] is thus similar in structure to § 52-500 . . ."; "an analogous determination in response to a like request . . ."; "in light of the similarity between § 45a-164 and § 52-500 in structure and in application, particularly under the facts of this case").

64. *Id.*

cases.”⁶⁵ Underlying that policy is the presumption that partition in kind is in the best interests of the owners.⁶⁶

Section 52-500 of the Connecticut General Statutes imposes the presumption that partition in kind is preferred for all partition actions. The party seeking partition by sale must prove that “partition in kind [is] impracticable or inequitable; and the interests of the owners would better be promoted by partition by sale.”⁶⁷ Section 45a-164 permits probate courts to authorize the sale of real property “if the court finds it would be for the best interests of the parties in interest to grant the application.”⁶⁸ The connection between private sales and partition in kind is explicitly reinforced in the probate statutes. Section 45a-166 states that “[t]he court of probate . . . shall direct whether the sale shall be public or private,” and “[i]f a private sale is directed, the court may, if it appears to be for the best interests of the estate, determine the price and the terms of the sale”⁶⁹

Thus where partition in kind cannot be made, a private sale is preferable to a public sale. “[A] private sale . . . is closer in character to a partition in kind because it gives the current owners a better chance of retaining their property.”⁷⁰ The appellate court accepted the superior court’s finding that the Giulietti family wished to retain ownership and control of 325 Kelly Road and Vernon Village, Inc. and determined that “at least three of the four siblings desired such a sale.”⁷¹ The Giulietti family’s expressed desire to retain their land was powerful evidence supporting the order of a private sale as “in the best interests of all the parties involved.”⁷² Thus the superior court fully complied with “the policy disfavoring the forced sale of family real property”⁷³ by ordering a *private* sale and “properly de-

65. *Fernandes*, 761 A.2d at 1288 (citing *Ford v. Kirk*, 41 Conn. 9, 12 (1874)). See also *Giulietti*, 784 A.2d at 935.

66. *Giulietti*, 784 A.2d at 935-36 (citing *Fernandes*, 761 A.2d at 1288). Cf. *Ford*, 41 Conn. at 12.

67. *Giulietti*, 784 A.2d at 934 n.30.

68. CONN. GEN. STAT. § 45a-164(a) (1991).

69. CONN. GEN. STAT. § 45a-166(a) (1991). This language has been interpreted as mandatory by the Connecticut Supreme Court. “If the sale is to be private, the court *must* also find that the price and terms of the sale are in the ‘best interests of the estate.’” *Satti v. Rago*, 441 A.2d 615, 618 n.3 (Conn. 1982) (emphasis added).

70. *Giulietti*, 784 A.2d at 935-36.

71. *Id.* at 936.

72. *Id.* at 936; *Giulietti v. Giulietti*, No. X03CV 980493096S, 1999 Conn. Super. LEXIS 3416, at *51-52 (Conn. Super. Ct. Dec. 15, 1999).

73. *Giulietti*, 784 A.2d at 936.

terminated that it had the authority pursuant to [section] 52-500.”⁷⁴

The superior court did not cite either the equitable nature of a partition action or the power of a court in equity to provide an appropriate remedy not authorized by statute as sources of authority for its decision to order a private sale.⁷⁵ Having concluded that, “it is within a trial court’s discretion to order a partition by sale,”⁷⁶ the Connecticut Appellate Court stated that “a partition by sale, although a creature of statute, is an equitable action.”⁷⁷ However, the appellate court did not link the trial court’s exercise of discretion in ordering a private sale to the equitable nature of a partition action. The appellate court cited principles of equity merely to dismiss Attorney Giulietti’s claim that a private sale would not bring a sufficient price.⁷⁸ Thus, although the appellate court acknowledged the action of partition, specifically partition by sale, as an equitable action,⁷⁹ it declined to use the wealth of authority, both historical and modern, surrounding partition as both an action and a remedy in equity to justify or substantiate its affirmation of the superior court’s order of a private sale. The Giulietti family presented a cause of action for partition seeking equity and the facts of the *Giulietti* case warranted an equitable remedy.⁸⁰ However, facts alone do not dictate the extent and nature of a trial court’s jurisdiction.⁸¹

74. *Id.*

75. The superior court stated that its decision to order a private sale was “warranted in light of the circumstances” because “[a]ll parties have requested that the court order the property [325 Kelly Road] to be sold at private sale” and “[t]he Giulietti family wishes to continue to operate Vernon Village, and their family-controlled corporation, Vernon Village, Inc. . . . operates a business on the land.” *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *52.

76. *Giulietti*, 784 A.2d at 936 (citing *Fernandes v. Rodriguez*, 761 A.2d 1283, 1290 (Conn. 2000)).

77. *Giulietti*, 784 A.2d at 936 (citing *Fernandes*, 761 A.2d at 1289).

78. *Giulietti*, 784 A.2d at 936-37. This claim, according to the appellate court, was unwarranted because “once the court has exercised its equitable jurisdiction by ordering a partition by sale, it also has discretion to approve or reject the sale.” *Id.* at 936 (citing *Fernandes*, 761 A.2d at 1290).

79. *Giulietti*, 784 A.2d at 936.

80. Both the superior and appellate court opinions draw upon the unique facts presented in order to justify the decision. *Id.* at 936-37; *Giulietti*, 1999 Conn. Super. LEXIS 3416, at *49-52. The appellate court cited the facts that the family wanted to retain ownership of the property at 325 Kelly Road and to continue operating Vernon Village, Inc. in support of a private sale, which is “closer in character to a partition in kind because it gives the current owners a better chance of retaining their property.” *Giulietti*, 784 A.2d at 936. This reliance on the facts may serve to restrict the effect of the ruling on other cases where the facts are not as compelling.

81. See *Giulietti*, 784 A.2d at 938 (quoting 30A C.J.S. *Equity* § 81 (1992)) (establishing that because the court assumed equitable jurisdiction over the matter, “the doc-

Giulietti v. Giulietti elucidates the question of whether there is sufficient authority in the body of law, both historical and modern, surrounding partition such that a trial court may, in the absence of specific statutory authority, order a partition by private, rather than public, sale in equity.

II. PARTITION AS AN ACTION AND A REMEDY

The term “partition” is used to describe both the action and the remedy available to any co-tenant who wishes to dissolve a co-tenancy relationship.⁸² It is defined as “the act or proceeding by which co-owners of property cause it to be either divided into as many shares as there are owners according to their interests therein, or, if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed” among the co-owners according to their interests therein and thereby “severing the unity of possession, so that the joint tenants may hold them in severalty.”⁸³ Partition is necessary “to allow persons who own property in common to sever their interests so that each one may take possession of, enjoy, and improve his separate estate at his own pleasure and convenience”⁸⁴

The right to partition may have initially been granted as a matter of grace;⁸⁵ however, it soon developed into a cognizable, absolute legal right.⁸⁶ The right to “partition yields to no consideration of hardship, inconvenience or difficulty”⁸⁷ with respect to actually partitioning the land or its effect on the parties in interest.⁸⁸ Fur-

trine of retaining jurisdiction in order to completely adjust the controversy extends to the granting of relief to a defendant or between codefendants.”).

82. BLACK’S LAW DICTIONARY 1141 (7th ed. 1999).

83. 59A AM. JUR. 2D *Partition* § 1 (2003).

84. *Mechling*, 120 N.E. at 543. *See also Peck*, 157 N.E.2d at 260; *Hurst*, 574 P.2d at 312 (noting “the purpose of the remedy of partition is to allow joint owners who cannot get along with each other to sever their relationship as joint owners.”).

85. *Murphy v. Murphy*, 175 N.E. 378, 379 (Ill. 1931); *Hill v. Reno*, 112 Ill. 154, 160 (1883) (asserting that the right of partition “has become a matter of right and not mere grace.”).

86. *Cates v. Johnson*, 19 So. 416, 417 (Ala. 1869) (labeling partition “a matter of right.”); *Peck*, 157 N.E.2d at 260 (calling the right to partition “imperative.”); *Murphy*, 175 N.E. at 379; *Hill*, 112 Ill. at 160; *Mercantile Bank v. Yeggy*, No. 1-633/00-1524, 2002 Iowa App. LEXIS 250, at *4 (Iowa Ct. App. Feb. 20, 2002) (recognizing the right of any tenant in common, “at any time, [to] denounce the tenancy and demand his share in severalty.”).

87. *Peck*, 157 N.E.2d at 260.

88. *Cates*, 19 So. at 417; *Johnson v. Olmsted*, 49 Conn. 509, 517 (1882); *Peck*, 157 N.E.2d at 260; *Mechling*, 120 N.E. at 543-44; *Hill* 112 Ill. at 160; *Michael v. Sphier*, 272 P. 902, 904 (Or. 1928) (citing FREEMAN, CO-TENANCY AND PARTITION § 433 (2d ed.

thermore, the right of partition will be given effect over and despite the objections of other co-owners.⁸⁹ The right to partition may be defeated only by a superior claim in equity where a court may dismiss the petition for partition if it determines, in its discretion, that it would not be in the best interests of the owners to alter or sever their property interests via partition,⁹⁰ or where partition would run contrary to public policy.⁹¹

Courts developed numerous methods to give the right of partition effect according to the facts and circumstances presented. Partition in kind means that lands held in common are physically divided into shares and each owner receives a share proportional to his interest in the land.⁹² Owelty partition, or payment of owelty, is a modification of partition in kind developed by courts of equity to equalize the shares through a payment of money, by the party receiving the larger, disproportionate share, to the party receiving a lesser share where the unique nature of the land prevents a more equitable division.⁹³ Partition can also be made by granting each party the right to use the land for a specified duration;⁹⁴ however, this remedy has fallen out of favor due to the obvious inconvenience and potential inequities created. Partition by sale is the more modern remedy, whereby a court may order that the land in question be sold for the highest price obtainable and the proceeds distributed to the parties according to their interests.⁹⁵ The historical development of these various methods, from partition in kind to

1886)); *Geis v. Vallazza*, 207 A.2d 248, 252 (Vt. 1965) (noting the law's willingness to order a partition by sale despite the objections of either owner); 59A AM. JUR. 2D *Partition* § 4 (2003). *But see Mechling*, 120 N.E. at 543-44.

89. *Hill*, 112 Ill. at 162; *Geis*, 207 A.2d at 251-52.

90. *Peck*, 157 N.E.2d at 260; *Mechling*, 120 N.E. at 543-44; *Michael*, 272 P. at 904 (citing FREEMAN, *supra* note 89, § 439). *But see* Long v. Long, 1 Watts. 265, 267 (Pa. 1883) (affirming private agreement of voluntary partition made when parties were minors, but which they performed after reaching the age of majority); 4 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY *Co-Ownership* § 475, at 312-15 (3d ed. 1975) (asserting that "the infancy of one or more of his co-tenants will not be permitted to suspend an adult co-tenant's right to enforce partition is well-settled, notwithstanding the solicitude of the courts for the welfare of minors").

91. *Peck*, 157 N.E.2d at 260.

92. 59A AM. JUR. 2D *Partition* § 1 (2003).

93. *Hill*, 112 Ill. at 167 (defining owelty as "pecuniary compensation"); *Rothert v. Rothert*, 441 N.E.2d 179, 181-82 (Ill. App. Ct. 1982); 59A AM. JUR. 2D *Partition* § 1 (2003); 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY, *Partition* § 50.07[4][c], at 50-49 (Michael Allan Wolf ed., 2002).

94. *See* *Hanson v. Willard*, 12 Me. 142, 147-48 (1835) (establishing that temporal division is an ancient doctrine recognized as law); *Loyd*, *supra* note 1, at 167.

95. *Michael*, 272 P. at 902; 59A AM. JUR. 2D *Partition* § 1 (2003).

partition by sale, highlights the fact that partition is an unusual remedy within the realm of property law because it alters the legal relationship between each owner and the land itself and, in the case of sale, it severs legal ownership altogether.⁹⁶

III. HISTORICAL DEVELOPMENT OF PARTITION

A. *English Law*

In England, there was no partition action at law or in equity for joint tenants or tenants in common until the mid-sixteenth century.⁹⁷ Co-tenants of land who no longer agreed about the management or disposition of the land were forced to remain co-tenants or to reach a voluntary agreement to dissolve the co-tenancy relationship.⁹⁸ Only coparceners were allowed to seek judicial intervention through courts of chancery.⁹⁹ A court of chancery could order partition in kind¹⁰⁰ or owelty partition.¹⁰¹ Coparceners were granted this privilege because they inherited the land and, therefore, had no choice as to whether they wanted to share ownership of the land with another or with the particular other that also inherited an interest.¹⁰² During the reign of Henry VIII,¹⁰³ the right to partition

96. "Partition is the right to a severance, when there is a rightful unity of title and possession." 59A AM. JUR. 2D *Partition* § 3 (2003).

97. 2 AMERICAN LAW OF PROPERTY *Partition* § 6.21, at 94-95 (1952); 7 POWELL, *supra* note 94, § 50.07[1], at 50-37 & § 50.09, at 50-54; 4 TIFFANY, *supra* note 91, § 473, at 307. *See also* *Pierce v. Pierce*, 123 N.E.2d 511, 512 (Ill. 1954) (providing historical background on partition).

98. Loyd, *supra* note 1, at 168.

99. *Hill v. Reno*, 112 Ill. 154, 159 (1883); *O'Brien v. Mahoney*, 60 N.E. 493, 494 (Mass. 1901).

100. Occasionally, where actual physical division could not be accomplished, temporal division was granted, which meant that one heir would use the property for a period of time and then the other for an equal period. Loyd, *supra* note 1, at 167. *See also* *Morrill v. Morrill*, 5 N.H. 134, 135 (1830) (validating temporal partition as a remedy); *Hanson v. Willard*, 12 Me. 142, 148 (1835). *But see* *Wood v. Little*, 35 Me. 107, 109 (1853) (holding that "[d]ivision by time is not authorized by statute" and "is not a practicable or substantial partition.").

101. Loyd, *supra* note 1, at 174.

102. *See* Loyd, *supra* note 1, at 165 (noting that where "the estate of the noble was indivisible so also was that of the villein" and that "it was in the interest of the lord of the manor that the holding of the villein remain undivided with a single heir answerable for the customary services."). *See also* Reid, *supra* note 61, at 858 n.15 (querying whether the right was restricted to coparceners so as not to allow those who entered into voluntary legal arrangements to use the law to terminate that relationship). *But see* *Johnson v. Olmsted*, 49 Conn. 509, 517 (1882) (asserting that the right to partition was so absolute that "[n]o person can be compelled to remain the owner with another of real estate, not even if he become such by his own act . . ."). Interestingly, modern law allows parties to sign anti-alienation agreements, which are contractual promises

was extended to joint tenants and tenants in common.¹⁰⁴ Any party in interest could compel division of the common property by writ of partition.¹⁰⁵

This right to demand partition was held absolute and applied to all parties in interest. This extension of the right to partition established the writ of partition as an action at law.¹⁰⁶ However, shortly after the enactment of the Act of Henry VIII,¹⁰⁷ "the court of chancery began to take jurisdiction of suits for partition."¹⁰⁸ In 1833, the writ of partition was abolished and partition could be sought only through a bill in equity.¹⁰⁹ Chancery courts were limited to the same remedies, partition in kind and payment of owelty¹¹⁰ that they had applied to coparceners prior to the Act of Henry VIII.¹¹¹ Limited to these remedies, but forced to provide a remedy by the absolute nature of the right to demand partition, courts often reached ridiculous results.¹¹² Finally in 1868, the Partition Act¹¹³ granted chancery courts, in their discretion, the authority to order the land sold upon the request of any owner where partition in kind was not in his or her best interest.¹¹⁴

not to seek judicial partition. 59A AM. JUR. 2D *Partition* § 58 (2003); 68 C.J.S. *Partition* § 11; 3 TIFFANY, *supra* note 91, § 474, at 309-10.

103. The reign of Henry VIII lasted from 1509 until 1547. STANDARD DICTIONARY OF FACTS 80-2 (1923).

104. 31 Hen. 8, c. 1 (1539) (Eng.).

105. Loyd, *supra* note 1, at 168-69.

106. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94; 4 TIFFANY, *supra* note 91, § 473, at 307; John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 758 (1985).

107. 31 Hen. 8, c. 1 (1539) (Eng.).

108. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94; Loyd, *supra* note 1, at 172-73; 4 TIFFANY, *supra* note 91, § 473, at 307.

109. 3 & 4 Will. 4, c. 27 (1691) (Eng.); 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94-95; 4 TIFFANY, *supra* note 91, § 473, at 307.

110. JOHN V. ORTH, 4 THOMPSON ON REAL PROPERTY, *Tenancies in Common* § 32.08(b), at 88-89 (David A. Thomas ed., 1994); Loyd, *supra* note 1, at 173-74.

111. 31 Hen. 8, c. 1 (1539) (Eng.).

112. See *Scovil v. Kennedy*, 14 Conn. 349 (1841) (ordering partition of a right held in co-tenancy to water in a stream used to power two mills by equalizing the size of the orifices used to draw water from the stream); *Turner v. Morgan*, 8 Ves. 143 (1803) (allotting to one party all of the chimneys and the sole staircase of a house).

113. 31 & 32 Vict., c. 40 (1868) (Eng.).

114. ORTH, *supra* note 111, at 88-89; Loyd, *supra* note 1, at 175; See also Reid, *supra* note 61, at 860 (asserting that "the Partition Act of 1868 turned the prevailing partition law on its head by favoring sales over partition in kind.").

B. *American Law*

American colonies, under the influence of English rule, adopted the laws of England.¹¹⁵ Early charters included the same provisions for partition as existed in England at the time.¹¹⁶ During colonial times, the writ of partition as established by the Act of Henry VIII,¹¹⁷ was incorporated into statute and continued to exist in the statutes adopted by some nascent states.¹¹⁸ After 1776, American legislatures were not obligated to incorporate the later English laws, such as the Partition Act,¹¹⁹ into statute and American courts were not bound to adhere to English common law.¹²⁰ However, in the absence of American case law, many early courts used English common law to guide or substantiate their opinions.¹²¹ As stated above, English courts of chancery had assumed jurisdiction of actions for partition after the Act of Henry VIII¹²² was passed¹²³ and the role of equity in partition was quite developed.¹²⁴ Therefore, prior to the Act of 1833¹²⁵ and the Partition Act,¹²⁶ the

115. Reid, *supra* note 61, at 860-61.

116. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94; ORTH, *supra* note 111, at 88-89; POWELL, *supra* note 94, § 50.07[1], at 50-37; 4 TIFFANY, *supra* note 91, § 473, at 307; Loyd, *supra* note 1, at 175-76. See Reid, *supra* note 61, at 861 n.37 (detailing early colonial legislation allowing partition).

117. 31 Hen. 8, c. 1 (1539) (Eng.).

118. Loyd, *supra* note 1, at 177-84; Reid, *supra* note 61, at 861 n.37.

119. 31 & 32 Vict., c. 40 (1868) (Eng.).

120. Some commentators attribute the various similarities between English law and American law to "the influence of the Crown" during the early colonial days. See Loyd, *supra* note 1, at 176. The distinct differences may be rooted in the colonial rejection of the European system of primogeniture, a system under which the eldest son inherited all of the land, in favor of a more equal distribution among all of the decedent's children. The latter system of distribution created more joint tenancies, which necessitated some method of equitable dissolution to prevent land from becoming inalienable. *Id.* at 177-78.

121. Many early opinions referred to English case law for the general principle of law or for guidance by example, even negative example. See, e.g., Richardson v. Monson, 23 Conn. 94, 95-96 (1854); Scovil v. Kennedy, 14 Conn. 349, 354 (1841); Wood v. Little, 35 Me. 107, 110 (1853); Hanson v. Willard, 12 Me. 142, 146-47 (1835). See ORTH, *supra* note 111, at 88-89 (stating that the Partition Act was "also copied in America . . ."); Casagrande, *supra* note 107, at 759-60 (stating that "American courts and legislatures inevitably relied upon English legal precedent in the absence of their own.").

122. 31 Hen. 8, c. 1 (1539) (Eng.).

123. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94 (asserting that equity had jurisdiction whenever an action at law resulting in the imposition of the remedy of partition in kind produced unjust results).

124. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94-95; Loyd, *supra* note 1, at 174.

125. 3 & 4 Will. 4, c. 27 (1691) (Eng.).

126. 31 & 32 Vict., c. 40 (1868) (Eng.).

concept that partition was an action in equity and that principles of equity were inherent to partition were well-established in English law. As American courts incorporated English law,¹²⁷ the distinction between equity and law in the context of partition became blurred.¹²⁸ English courts of law and courts of chancery maintained concurrent jurisdiction over partition during the period following the enactment of the Act of Henry VIII¹²⁹ until 1833,¹³⁰ when partition could only be sought through a bill in equity.¹³¹ Although both courts were limited to the remedies of partition in kind and owelty partition, the results were often conflicting.¹³² The Partition Act¹³³ resolved this confusion by allowing both courts of law and of chancery the discretion to order partition by sale under the same standard.¹³⁴ Since the American law of partition was based almost entirely on English law prior to the revolutionizing effects of the Partition Act,¹³⁵ most state statutes maintained concurrent jurisdiction in law and equity.¹³⁶ Thus equity never lost jurisdiction over actions for partition, and the codification of partition into state statutes did not displace the principles of equity inherent in partition.¹³⁷

The prevalence of concurrent jurisdiction in law and equity led

127. 59A AM. JUR. 2D *Partition* § 26 obs. (2003); ORTH, *supra* note 111, at 88-89.

128. *Hill v. Reno*, 112 Ill. 154, 159 (Ill. 1883); *Wright v. Marsh, Lee & Delavan*, 2 Greene 94, 104-05 (Iowa 1849), available at 1849 Iowa Sup. LEXIS 9, at 22. *But see* *Copeland v. Giles*, 123 So. 2d 147, 148 (Ala. 1960) (holding that "a court of equity in this state has no original or inherent jurisdiction to order the sale of lands for division among the joint owners.").

129. 31 Hen. 8, c. 1 (1539) (Eng.).

130. Loyd, *supra* note 1, at 172-73.

131. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 94-95; 2 TIFFANY, *supra* note 91, § 473, at 307.

132. Loyd, *supra* note 1, at 174 (discussing the procedural wrangling in *Turner v. Morgan*, 8 Ves. 143 (1803), concerning an order of partition in kind and the court's refusal to utilize owelty).

133. 31 & 32 Vict., c. 40 (1868) (Eng.).

134. *Id.* (holding that "the court must order a sale on request of the owners of a moiety in the property unless good reason is shown to the contrary; and may, in its discretion, order a sale at the request of any owner, if it appears that it will be beneficial by reason of the nature of the property, the number or disability of the parties, or other circumstances."). *See also* Loyd, *supra* note 1, at 175.

135. 31 & 32 Vict., c. 40 (1868) (Eng.).

136. *Wright v. Marsh, Lee & Delavan*, 2 Greene 94, 106-07 (Iowa 1849), available at 1849 Iowa Sup. LEXIS 9, at *18-22; *Williams v. Coombs*, 33 A. 1073 (Me. 1895); *Hanson v. Willard*, 12 Me. 142, 147 (1835); 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 95; 2 TIFFANY, *supra* note 91, § 473, at 307; Loyd, *supra* note 1, at 185.

137. *Clements v. Seaboard Air Line Ry. Co.*, 124 S.E. 516, 516 (Ga. 1924); *Hess v. Voss*, 52 Ill. 472, 473 (Ill. 1869), available at 1869 WL 5477, at *2; *Rothert v. Rothert*, 441 N.E.2d 179, 182 (Ill. App. Ct. 1982), *Wright*, 2 Greene at 106-07, available at 1849

to some interesting developments in American partition law. Most states had specifically incorporated the limited remedies of partition in kind and payment of owelty into statute.¹³⁸ Therefore, regardless of whether the co-tenant presented a writ under the common law, a petition under the statute, or a bill in chancery, the court's powers at law and in equity were restricted by the same two inflexible remedies. In fact, some courts ceased to distinguish between an action at law and a bill in equity.¹³⁹ This limitation as to remedies created the same quandary for American courts as confronted by the English courts prior to 1868.¹⁴⁰ Since any co-tenant had a right to demand partition, the court was obligated to devise a plan for equitable partition.¹⁴¹ Yet frequently both remedies were too rigid and inflexible to accommodate the unique nature of the property at issue,¹⁴² and the results often failed to accomplish the very purpose of partition.¹⁴³

Iowa Sup. LEXIS 9, at *19-22, *Dall v. Confidence Silver Mining Co.*, 3 Nev. 531, 533 (1867), available at 1867 WL 2077, *2.

138. See, e.g., *Hanson*, 12 Me. at 147-48 (expanding the available remedies to include sale); *Arms v. Lyman*, 22 Mass. 210, 211 (1827) (restricting authority of probate court to order partition in kind or payment of owelty citing state statute of 1817). See also *Casagrande*, *supra* note 107, at 760; *Loyd*, *supra* note 1, at 174-75; *Merrill Isaac Schnebly, Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process*, 42 HARV. L. REV. 30, 31-32.

139. *Hanson*, 12 Me. at 147 (noting that "[t]he bill for partition [in equity] is in the nature of a writ for partition . . ."); *Reid*, *supra* note 61, at 861. See also 4 *TIFFANY*, *supra* note 91, § 473, at 307. But see *O'Brien v. Mahoney*, 60 N.E. 493, 494 (Mass. 1901) (noting that "this remedy [petition in equity], extended and improved from time to time, has substantially superseded in practice the old writ."); *Schnebly*, *supra* note 139, at 31 (commenting that the common law action for partition has been displaced by the equitable remedy (citing *FREEMAN*, *supra* note 89, ch. 19)).

140. See *Craig-Taylor*, *supra* note 61, at 747 (discussing the dilemma created by the remedy of forced judicial sales).

141. Limited to partition in kind and owelty, many defendants attempted to argue that the difficulties in making partition and the resulting inconveniences were sufficient grounds to deny the plaintiff's demand. All of these objections were rebuffed at length in the opinions, which re-affirmed that any co-tenant had an absolute right to partition regardless of the resulting difficulties or inconveniences. *Scovil v. Kennedy*, 14 Conn. 349, 353 (1841); *Hanson*, 12 Me. at 146-47.

142. See *Scovil*, 14 Conn. at 351 (affirming order of construction of two orifices of equal diameter at the same level at great expense so as to equitably divide the water powering a mill that had been ordered physically divided to create two mills); *Loyd*, *supra* note 1, at 174-75.

143. See VT. STAT. ANN. § 5162 (1973) (stating that real estate containing a spring and rights to use the water from the spring could be partitioned "in the same manner as other real estate" by "equitably apportion[ing] the use of such water and the manner of its use"). This resolution sounds remarkably like a continuation of the same relationship. In addition, some state statutes protected particular businesses or property interests from partition since it was recognized that partition in kind would destroy the business and the value of the property. See ME. REV. STAT. ANN., Partition of Real

State legislatures, empowered by the United States Constitution to regulate property and property rights,¹⁴⁴ did not hesitate to enact statutes authorizing courts to order partition by sale. In fact, many states had enacted such statutes prior to the Civil War,¹⁴⁵ a point that re-affirms the independent development of partition in America. These statutes expanded the available remedies to include partition by sale and extended the powers of the courts by allowing them to order judicial sales, in their discretion, subject to a minimal standard.¹⁴⁶

Despite the early date of many of these statutes, partition by sale never became the prevalent or the preferred remedy in America.¹⁴⁷ In fact, partition in kind remains the preferred remedy in the statutes and in the common law.¹⁴⁸ This unique American

Estate, § 6506 (West 1964) (limiting the partition of tenancies in common of sawmills to temporal partition only).

144. U.S. CONST. art. I, § 10 & amend. X (reserving to the states rights not enumerated to the federal government).

145. See, e.g., *Richardson v. Monson*, 23 Conn. 94, 98 (1854) (asserting that "statutes authorizing this [the sale of real estate] are to be found in every state"), *Wood v. Little*, 35 Me. 107, 111 (1853) (stating that "[i]n England and many of the States, perhaps the most common mode of proceeding [is] . . . to decree a sale of the whole estate"). Cf. *Hanson*, 12 Me. at 144 (1835) (determining that, although the statute authorized partition by writ, it did not specify the mode of partition). But see *Reid*, *supra* note 61, at 861 (contending that "[t]hese statutes, permitting only partitions in kind, remained in effect until after the Civil War . . ."). The Civil War began in 1861 and ended in 1865; Parliament did not enact the Partition Act until 1868. By 1922, the Supreme Court of South Dakota summarized the prevalence of statutes authorizing sales stating: "It is sufficient to observe that such laws, perhaps in slightly varying forms, are in force in every state in the Union" *Kluthe v. Hammerquist*, 188 N.W. 749, 750 (S.D. 1922). But see *Hayden v. Denslow*, 27 Conn. 335 (1858) (dismissing a petition in chancery for partition by sale of property where the petitioners had no equitable title and were not in possession of the land in question).

146. *Wright v. Marsh, Lee & Delavan*, 2 Greene 94, 105 (Iowa 1849), available at 1849 Iowa Sup. LEXIS 9, at *22.

147. *Reid*, *supra* note 61, at 862 (stating that "[t]he American statutes thus made judicial sales available to American landowners but not as readily as under the English Act of 1868, which promoted and encouraged sales of the common property.").

148. *Peck v. Peck*, 157 N.E.2d 249, 260 (Ill. 1959); *Rothert v. Rothert*, 441 N.E.2d 179, 182 (Ill. App. Ct. 1982); *Tri-State Concrete Co. v. Stephens*, 395 So. 2d 894, 896 (La. Ct. App. 1981); *Williams v. Coombs*, 33 A. 1073, 1075 (Me. 1895); *Swogger v. Taylor*, 68 N.W.2d 376, 384 (Minn. 1955); *Trowbridge v. Donner*, 40 N.W.2d 655, 660 (Neb. 1950); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N. D. 1984); *Hurst v. Hall*, 574 P.2d 311, 312 (Or. 1978); *Eli v. Eli*, 557 N.W.2d 405, 408 (S.D. 1997); *Geis v. Vallazza*, 207 A.2d 248, 252 (Vt. 1965); *Blanchard v. Cross*, 123 A. 382, 383 (Vt. 1924); *Roberts v. Coleman*, 16 S.E. 482, 486 (W. Va. 1892). This preference remains a rule of law even in the modern era. See generally *Reid*, *supra* note 61 (arguing that although the preference for partition in kind is codified in statute, reiterated in numerous judicial opinions and a commonly held rule of law, the majority of partition actions are resolved by judicial sale for the sake of finality, judicial economy and efficiency).

preference for partition in kind may have been preserved for reasons outside of its historical origins. Partition in kind comports with the established principles of law and property ownership because it does not compel a person to sell his land,¹⁴⁹ it does not disturb a long-recognized form of inheritance—dividing land equally among all children and creating a co-tenancy—or upset current ownership of lands received via inheritance,¹⁵⁰ and it does not sever personal sentiments or feelings for land that developed over years and generations by displacing families or family members from their land.¹⁵¹ Partition in kind reinforced the more egalitarian method of inheritance adopted in America, which rejected the European tradition of primogeniture, by providing a method of dissolving the co-tenancy while granting each heir a portion of the actual land.¹⁵² It encouraged parties to explore the abundance of unchartered and unsettled lands and to file land claims jointly with full knowledge that they could seek an equitable partition should they so desire in the future.¹⁵³ Co-tenants at American law are treated like partners in a business partnership; partition dissolves the partnership and distributes the asset, the land, according to the interests of each party. And yet co-tenancies seem to occur more often in the private context, partnerships and businesses being governed by a separate body of law.¹⁵⁴ In the private context, the parties' relationships to the land are often complicated by more personal kinds of land ownership, such as the family farm, the family home, or the ancestral homestead.¹⁵⁵ American jurisprudence struggled to reconcile the

149. *Phillips v. Phillips*, 104 N.W.2d 52, 56 (Neb. 1960); *Schnell*, 346 N.W.2d at 720-21; *Eli*, 557 N.W.2d at 411; *Croston v. Male*, 49 S.E. 136, 137 (W. Va. 1904); *Roberts*, 16 S.E. at 486.

150. *Schnell*, 346 N.W.2d at 720-21; *Eli*, 557 N.W.2d at 411.

151. *Schnell*, 346 N.W.2d at 721 (asserting that each co-tenant has "the right to preserve the heritage of [her] labors . . .").

152. *Loyd*, *supra* note 1, at 176-77. See *Long v. Long*, 1 Watts. 265, 269 (Pa. 1832) (stating "[i]n this state, our statute regulating the descent of real estate, passes it upon the death of the party, dying seised and intestate, to his children equally, to hold it as tenants in common . . .").

153. *Lavalle v. Strobel*, 89 Ill. 370, 381, 386 (1878) (holding that assignment of lots to each co-tenant on original plat of land purchased jointly for development was valid partition). See generally *Loyd*, *supra* note 1, at 177.

154. During the nineteenth century and the first half of the twentieth century, courts were asked to partition cotton mills (*Wood v. Little*, 35 Me. 107-08 (1853)), saw-mills (*Morrill v. Morrill*, 5 N.H. 134 (1830)), and even hotels (*Willard v. Willard*, 145 U.S. 116 (1892)).

155. See e.g. *Ford v. Kirk*, 41 Conn. 9 (1874) (dismissing an action to partition land inherited in part by both the plaintiff and the defendant where the plaintiff's title to some lands acquired through tax liens was questionable); *Kelley v. Madden*, 40 Conn. 274 (1873) (granting partition in kind of a farm purchased by a brother and sister

objective requirements that the court fashion a remedy upon a petition for partition with the rather subjective nature of the parties' relationships to the land in the context of ordering a judicial sale.

The new statutes authorizing sale imposed a standard of proof, variously worded in the different states, that codified the preference for partition in kind and the equitable nature of the remedy of sale.¹⁵⁶ The remedy of sale was available only where the petitioner could show that a sale would better promote the interests of all of the parties.¹⁵⁷ The inverse formulation, used by the majority of states,¹⁵⁸ required that the petitioner show that partition in kind

jointly); *Wilson v. Peck*, 39 Conn. 54 (1872) (denying petitioners partition of a piece of land which the grantor had conveyed with the stated purpose of establishing a family burial ground); *Coxe v. Coxe*, 481 A.2d 86 (Conn. App. Ct. 1984) (ordering partition in kind of a family farm which served as the residence and sole source of income to a widow and her two sons); *Schnell*, 346 N.W.2d at 713 (reversing an order of sale in favor of partition in kind of a family owned ranch of approximately four thousand five hundred acres); *Maupin v. Opie*, 964 P.2d 1117 (Or. 1998) (reversing order of private sale and ordering public sale of six thousand acre family ranch, which court found was not susceptible of partition in kind because smaller parcels could not support ranching activity and reduction in value would cause great prejudice to owners); *Eli v. Eli*, 557 N.W.2d 405, 405 (S.D. 1997) (reversing an order of sale of one hundred twelve acre parcel and remanding for partition in kind); *Nelson v. Hendricks*, 54 N.W.2d 324 (S.D. 1952) (affirming order of sale of eight hundred forty acre farm based on finding that property could not be partitioned in kind without great prejudice to the owners).

156. The remedy of sale developed in equity to lessen the injustice of the limited remedies of partition in kind and owelty. Thus, where the petitioner can show that partition in kind will cause injury, a court will order partition by sale. 59A AM. JUR. 2D *Partition* § 1 (2003); AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 95-6; 2 TIFFANY, *supra* note 91, § 479.1, at 206-07. See also *Idema v. Comstock*, 110 N.W. 786, 787 (Wis. 1907) (citing WIS. REV. STAT. § 3119 (1898)) (affirming that "the equitable rule has been made a matter of written law providing for a sale for the purposes of partition only when partition in kind would result in 'great prejudice to the owners'").

157. Connecticut enacted a partition act in 1848 authorizing sale "whenever in the opinion of the court a sale will better promote the interests of all parties *than a partition*." *Johnson v. Olmsted*, 49 Conn. 509, 513 (1882). See also *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 144 (Va. 1986) (requiring showing that the interests of those entitled to the property or the proceeds "will be promoted by a sale." (citing VIRGINIA CODE § 8.01-83)); *Blanchard v. Cross*, 123 A. 382, 384 (Vt. 1924), *Roberts v. Coleman*, 16 S.E. 482, 486 (W. Va. 1892) (requiring that a sale promote the interests of the parties). The language of the Connecticut statute mirrors the English Partition Act of 1868 and yet predates it by twenty years. But see *Fernandes v. Rodriguez*, 761 A.2d 1283, 1288 (Conn. 2000) (claiming that "[i]n Connecticut, an act extending the power of our courts to order a sale in partition proceedings was enacted in 1844." (citing 1844 Pub. Acts C. XIII)).

158. See *Williams v. Coombs*, 33 A. 1073, 1074 (Me. 1895) (finding that "property could not be divided without greatly impairing its value . . ."); *Codman v. Tinkham*, 32 Mass. 364, 365 (1834) (ordering sale upon finding that "a division of [of] the land could not be made without greatly diminishing the value of the whole."); *Leavitt v. Benzing*, 82 A.2d 86, 87 (N.H. 1951) (establishing that right to sale depends in part on finding that property cannot be divided without great prejudice); *Maupin v. Opie*, 964 P.2d

was impracticable,¹⁵⁹ i.e. physically impossible, or that it would be greatly prejudicial or result in great inconvenience to the parties.¹⁶⁰ Thus the petitioner had to present proof sufficient to rebut the codified presumption that partition in kind was the appropriate remedy.¹⁶¹ The interests of the petitioning party carried no more weight than those of any other party or parties in determining the appropriate remedy.¹⁶² The proof lay in the facts and circum-

1117, 1123 (Or. 1998) (citing *Fike v. Sharer*, 571 P.2d 1252, 1254 (Or. 1977) (holding that “[t]he ‘established test’ to determine whether partition in kind would result in great prejudice to the owners is ‘whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole.’”); *Eli*, 557 N.W.2d at 408; *Nelson*, 54 N.W.2d at 324; *Blanchard*, 123 A. at 383-84 (stating that “[t]he language used in the statute[s] [sic] of different states varies somewhat . . . making ‘great inconvenience’ the test; but the essential consideration is the pecuniary welfare of the owners.”); *Idema v. Comstock*, 110 N.W. 786, 787 (Wis. 1907) (citing WIS. REV. STAT. § 3119 (1898) (noting that “the established test of whether partition in kind would result in ‘great prejudice to the owners’ is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole.”)). See also 59A AM. JUR. 2D *Partition*, § 191 (2003).

159. See *Johnson*, 49 Conn. at 517 (holding that “[e]very owner with another is entitled to separate ownership by one of these; by partition first and always, if that is possible; if it is not, then by sale”). See also *Candee v. Candee*, 86 A. 758, 759 (Conn. 1913) (citing *Johnson*, 49 Conn. at 509); *Bell v. Smith*, 71 S.W. 433, 434 (Ky. 1903); *Williams*, 33 A. at 1074 (finding that the house was “not susceptible of division and separate occupancy . . .”); *Nelson*, 54 N.W.2d at 325 (finding that ranch with one group of farm buildings constituted “single operating unit” not susceptible to division); *Benet v. Ford*, 74 S.E. 394, 397 (Va. 1912) (ordering the land sold upon showing that it was not susceptible to division in kind).

160. See *Cates v. Johnson*, 19 So. 416, 416 (Ala. 1896); *Johnson*, 49 Conn. at 518; *Richardson vs. Monson*, 23 Conn. 94, 95 (1854); *Williams*, 33 A. at 1075; *Wilson v. European & N. Am. R.R. Co.*, 62 Me. 112, 112 (1873), available at 1873 WL 3171, at *1; *Codman*, 32 Mass. at 365; *Kluthe v. Hammerquist*, 188 N.W. 749, 750 (S.D. 1922); *Croston v. Male*, 49 S.E. 136, 138 (W. Va. 1904); *Roberts*, 16 S.E. 482, 486 (W. Va. 1892).

161. See, e.g., *Willard v. Willard*, 145 U.S. 116, 119 (1892); *Johnson*, 49 Conn. at 517; *Tri-State Concrete Co. v. Stephens*, 395 So. 2d 894, 896 (La. Ct. App. 1981); *Swogger v. Taylor*, 68 N.W.2d 376, 384 (Minn. 1955); *Phillips v. Phillips*, 104 N.W.2d 52, 56 (Neb. 1960); *Schnell*, 346 N.W.2d at 716; *Eli*, 557 N.W.2d at 408; *Nelson*, 54 N.W.2d at 324; *Kluthe*, 188 N.W. at 750; *Idema*, 110 N.W.2d at 787 (holding that petitioner has burden of showing that partition in kind cannot be made without inconvenience or prejudice to owners).

162. See *Kluthe*, 188 N.W. at 750; *Croston*, 49 S.E. at 139. See also *Reitmeier v. Kalinoski*, 631 F. Supp. 565, 578 (D. N.J. 1986) (providing a succinct, modern statement of the principle). The court in *Reitmeier* asserts that “[i]t is an established principle that a court of equity, in decreeing partition, does not act ministerially and in obedience to the call of those who have a right to the partition, but finds itself on its general jurisdiction as a court of equity, and administers its relief . . . according to its own notions of general justice and equity between the parties.” *Id.* This principle is a slight modification of the established tenet of partition that the right to partition prevails over and despite the objections of other co-tenants, unless a superior claim in inequity has been presented.

stances of each individual case.¹⁶³ The unique character of the land,¹⁶⁴ the number of parties claiming an interest,¹⁶⁵ the quantity and quality of improvements to and attachments on the land¹⁶⁶ were all factors that a court would consider in determining the remedy. The existence of these same factors made the land in question resistant to equitable partition in kind.¹⁶⁷ Yet prior to the enactment of statutes authorizing partition by sale, difficulty in making the partition, any inconveniences to the parties, and even the destruction of the value of the property were insufficient reasons to deny partition.¹⁶⁸ "[I]t is no sufficient objection to a partition that it would be attended with the most inconvenient consequences, and that the value of the property so much depends on its entireness, that its division would materially lessen that value."¹⁶⁹ Courts were forced to provide a remedy for a right asserted,¹⁷⁰ even where the only available remedy caused more harm than the injury for which

163. See *Willard*, 145 U.S. at 118 (asserting that "[t]he right to a sale depends altogether upon statute, and will only be directed when the facts and circumstances required by statute to authorize it are affirmatively made to appear."); *Swogger*, 68 N.W.2d at 380 (establishing that statutory provisions for partition neither restricted nor impaired "the court's inherent power to do equity as the peculiar circumstances of each case might require."); *Nelson*, 54 N.W.2d at 324 (holding that the determination of whether the land in controversy could be partitioned in kind was a question for the trial court based on the evidence presented).

164. See *Candee*, 86 A. at 760 (finding that "[i]t is manifest that this real estate [an irregularly shaped parcel of fifty-five acres of which forty was swampland] cannot be advantageously divided."); *Rutherford v. Jones*, 14 Ga. 521, 524 (1854), *available at* 1854 WL 1494, *1-3 (indicating difficulty in dividing twenty-five city lots); *Hess v. Voss*, 52 Ill. 472 (1869), *available at* 1869 WL 5477, *1-2 (finding that an undivided one fourth interest in an improved city lot was not susceptible of division); *Idema*, 110 N.W. at 787 (stating that "quantity and quality [are] relatively considered . . .").

165. *Candee*, 86 A. at 759-60 (indicating that the number of "distributees of the estate" was a factor in determining that partition in kind would not be in the best interests of the parties).

166. See *Johnson v. Olmsted*, 49 Conn. 509, 509-11 (1882) (ordering the sale of a parcel of land in the city of Hartford containing three buildings owned jointly by twelve persons, only three of whom were ascertained by the court, each having one, one hundred forty-fourth part, finding a sale in the best interest of the property and the parties); *Bell v. Smith*, 71 S.W. 433, 434 (Ky. 1903) (determining that improved city lot was not susceptible of division without materially impairing value); *Williams v. Coombs*, 33 A. 1073, 1074 (Me. 1895) (determining that city lot containing one house was not susceptible of division). *But see* *Eaton v. Hackett*, 352 A.2d 748, 752 (Me. 1976) (affirming a division of two lots containing four buildings).

167. See generally *supra* note 165 and *infra* notes 220-23 (revealing the diversity of factors considered and some regional differences in how the quantity of land affects the remedy).

168. See generally *Scovil v. Kennedy*, 14 Conn. 349, 360 (1841); *Hanson v. Willard*, 12 Me. 142, 146 (1835).

169. *Hanson*, 12 Me. at 146.

170. *Id.*; *Morrill v. Morrill*, 5 N.H. 134, 136 (1830).

the petitioner had sought judicial relief.¹⁷¹ This seemingly ridiculous rule was an attempt to reconcile the absolute nature of the right to partition and the inevitable results of the only available remedy, partition in kind. These factors took on a new significance with the introduction of the remedy of sale. Under the statutes authorizing sale, courts were required to consider any evidence relevant to its determination as to the suitable method of partition.¹⁷² However, the statutes offered no guidance as to what facts were pertinent, the weight to be accorded such facts, the quantity of evidence necessary to overcome the presumption, or even what these threshold standards, “in the best interest” or “greatly prejudicial” meant.¹⁷³ All of these judgments were within the broad discretion-

171. *Codman v. Tinkham*, 32 Mass. 364, 366-67 (1834) (interpreting strictly the statute authorizing owelty partition and thereby preventing the owner of eight undivided ninth parts of a city lot containing buildings from obtaining the other undivided ninth part at fair market value); *Morrill*, 5 N.H. at 332 (affirming actual partition of the lands of a saw-mill leaving one half inaccessible except by traveling over the other half).

172. *Blanchard v. Cross*, 123 A. 382, 384 (Vt. 1924) (finding that “[i]f the offered evidence was admissible, it was because it tended to show that the pecuniary interests of the owners . . . would not be enhanced by a sale of the property.”); *Cauthorn v. Cauthorn*, 85 S.E.2d 256, 261 (Va. 1955) (allowing that a court of equity is authorized to sell jointly held lands, “[i]f the court determines from competent evidence in the record before it that the land is not susceptible of division in kind . . .”).

173. Most jurisdictions measure “best interests” and “greatly prejudicial” in monetary terms, thus the highest price obtainable is in the parties best interests, or conversely the remedy that impairs or diminishes the value of the property is deemed “greatly prejudicial.” *See, e.g., Rutherford v. Jones*, 14 Ga. 521, 524 (1854), *available at* 1854 WL 1494, *3 (commenting that partition in kind would greatly depreciate the value of the land); *Rothert v. Rothert*, 441 N.E.2d 179, 182-83 (Ill. 1982) (establishing value of property for owelty settlement); *Welch v. Zucco*, 665 So. 2d 697, 701 (La. Ct. App. 1995) (establishing minimum bid indicated plaintiff’s efforts to obtain fair market value); *Tri-State Concrete Co., Inc. v. Stephens*, 395 So. 2d 894, 897 (La. Ct. App. 1981) (allowing sale so that owners might “realize the full present value of the property . . .”); *Williams v. Coombs*, 33 A. 1073, 1074 (Me. 1895) (opining that the “property could not be divided without impairing its value”); *Phillips v. Phillips*, 104 N.W.2d 52, 56 (Neb. 1960); *Trowbridge v. Donner*, 40 N.W.2d 655, 660 (Neb. 1950) (discussing value of a share relative to the whole following partition in kind). However, some jurisdictions considered more subjective factors, such as the parties’ relationship to the land and financial situation. *See Delfino v. Vealencis*, 436 A.2d 27, 31-32 (Conn. 1980) (discussing economic impact on defendant whose residence and business were located on property at issue); *Coxe v. Coxe*, 481 A.2d 86, 88 (Conn. App. Ct. 1984) (describing defendant’s farm as “the sole source of income and livelihood to the family.”); *Whiteley v. Whiteley*, 84 A. 68, 69-70 (Md. 1912) (noting that appellant had bid on property because “it had been his father’s home.”); *Kent v. Kent*, 835 P.2d 8, 10 (Nev. 1992) (endorsing trial court’s approach, which was “motivated by a desire to keep each brother in his respective business . . .”); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N.D. 1984) (citing “financial ability of one of the parties to purchase the property . . .”); *Maupin v. Opie*, 964 P.2d 1117, 1121 (Or. 1998) (discussing parties’ personal history on land in question).

ary powers granted to the courts by the statutes.¹⁷⁴ In order to make the remedy of sale available, the court had to take the interests of all of the parties¹⁷⁵ and the particular circumstances regarding the land into consideration.¹⁷⁶ In doing so, courts were exercising their equitable powers to provide full and complete justice.

Eventually, every state included partition by sale as a remedy.¹⁷⁷ Although courts recognized and used the remedy of sale, they did so reluctantly.¹⁷⁸ The tortured (and rather tortuous) language of early opinions reveals that courts were uncomfortable ordering the sale of land held in common.¹⁷⁹ "The statute giving the power of sale introduces, as we think, no new principle; it provides only for an emergency, when a division cannot be well made, in any other way."¹⁸⁰ Courts used these "prejudice tests" to overcome the conflict between the right of any co-tenant to partition and the remedy of sale,¹⁸¹ which divested the owners of their objective, legal

174. See *Cauthorn v. Cauthorn*, 85 S.E.2d 256, 261 (Va. 1955) (concluding that "the court is given broad powers to deal with the subject [the land] as the interest of the parties and the circumstances of the case may require.").

175. *Hayden v. Denslow*, 27 Conn. 335, 343 (1858) (asserting that "[t]he powers conferred on the court by the statute under which this application [for partition by sale] is made are extraordinary powers Such a power ought to be exercised with a careful regard to the rights of the parties objecting to the sale."); *Kent*, 835 P.2d at 10 (Nev. 1992) (affirming that the "manner and method of partition is properly animated by concern for the interests of the individual parties . . ."); *Schnell*, 346 N.W.2d at 716 (factoring in the "situation of the parties and their respective financial abilities").

176. See *Croston v. Male*, 49 S.E. 136, 139 (W. Va. 1904) (holding that "[i]t is the duty of the court, before decreeing a sale in a partition suit, to judicially determine the rights and interests of the co-tenants in the land, and failure to do so is ordinarily reversible error.").

177. See *Williams v. Coombs*, 33 A. 1073, 1074 (Me. 1895); *Swogger v. Taylor*, 68 N.W.2d 376, 381 (Minn. 1955); 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.26, at 113; 7 POWELL, *supra* note 94, § 50.07[5], at 50-49; 4 TIFFANY, *supra* note 91, § 474, at 309; Reid, *supra* note 61, at 861-62.

178. See Reid, *supra* note 61, at 861 (stating that "[t]he American statutes thus made judicial sales available to American landowners but not as readily as under the English Act of 1868 [Partition Act], which promoted and encouraged the sale of the common property."). But see *Craig-Taylor*, *supra* note 61, at 752 (arguing, rather unpersuasively, that "the forced judicial partition sale was an American innovation.").

179. "It is a very great exercise of authority for the legislature to deprive a person of his interest in land against his will; to have such property sold and oblige the owners to take money which they may be unable to invest or ignorant of how to take care of." *Johnson v. Olmsted*, 49 Conn. 509, 515-16 (1882).

180. *Richardson v. Monson*, 23 Conn. 94, 96 (1854).

181. See *Craig-Taylor*, *supra* note 61, at 747 (discussing the dilemma created between the rights of co-tenants to partition and the rights of owners forced to sell their land).

relationship to the land¹⁸² and severed their subjective, personal ties to the land.¹⁸³ This discomfiture was expressed in different ways as courts attempted to impose some cognizable restraints on the power of the judiciary in ordering judicial sales. Two obvious control mechanisms became part of the common law: (1) courts' refusal to extend the absolute nature of the right to partition to include the remedy of partition by sale,¹⁸⁴ and (2) courts' rejection of the well-established principle that equity is inherent to partition actions where the remedy requested is sale.¹⁸⁵ These courts instead relied on statutes to prescribe and proscribe their powers.

Following the enactment of the Partition Act of 1868,¹⁸⁶ English courts held that the right to partition included the right to partition by sale.¹⁸⁷ This conflated both the action and remedy, leaving no room for courts to exercise the discretion granted by the Partition Act,¹⁸⁸ despite equity's almost exclusive jurisdiction over partition after 1833.¹⁸⁹ The right to partition in American law occupied a more tenuous position when the remedy demanded was sale. Some courts held that the right to demand partition remained abso-

182. "It [sale] differs materially from a partition [I]n the case of sale all this is changed. The owners are entirely deprived of their property. Its very nature is changed. A sale is forced perhaps at a time and in a manner most unfavorable to the owners." *Johnson*, 49 Conn. at 516.

183. *Kent v. Kent*, 835 P.2d 8, 10 (Nev. 1992); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N.D. 1984) (citing as factors in determining the appropriate remedy "[s]entimental reasons, particularly in the preservation of a home"); *Fike v. Sharer*, 571 P.2d 1252, 1254 (Or. 1977). See *Craig-Taylor*, *supra* note 61, at 767-769 (arguing that partition by sale divests African-Americans of the economic, cultural and personal benefits of land ownership). See also Manel Baucells & Steven A. Lippman, *Justice Delayed is Justice Denied: A Cooperative Game Theoretic Analysis of Hold-Up in Co-Ownership*, App. B: *Delfino v. Vealencis: Origin and Resolution*, 22 CARDOZO L. REV. 1191, 1220-48 (2001) (providing a probative discussion of the decision-making process and the power of effective narrative in partition litigation).

184. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 95-6. See, e.g., *Willard v. Willard*, 145 U.S. 116, 118-19 (1892); *Copeland v. Giles*, 123 So. 2d 147, 148 (Ala. 1960); *Leake v. Casati*, 363 S.E.2d 924, 926 (Va. 1988); *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 144 (Va. 1986); *Cauthorn v. Cauthorn*, 85 S.E.2d 256, 258-59 (Va. 1955); *Blanchard v. Cross*, 123 A. 382, 383 (Vt. 1924); *Croston v. Male*, 49 S.E. 136, 137 (W. Va. 1904).

185. See *Sensabaugh*, 349 S.E.2d at 144; *Cauthorn*, 85 S.E.2d at 258-59. But see *Dall v. Confidence Silver Mining Co.*, 3 Nev. 531, available at 1867 WL 2077, at *2 (holding that "[w]hen the statute prescribes a course to be pursued, that course must doubtless be followed so far as it goes, but beyond it the general principles [of equity] . . . should control the action of the courts.").

186. 31 & 32 Vict., c. 40 (1868) (Eng.).

187. See *Reid*, *supra* note 61, at 860.

188. 31 & 32 Vict., c. 40 (1868) (Eng.).

189. 2 TIFFANY, *supra* note 91, § 473, at 307.

lute, but that no right to a particular remedy existed.¹⁹⁰ Other courts held that the right to partition had been expanded to include the remedy of partition by sale.¹⁹¹ In 1892, the United States Supreme Court confirmed that partition by sale was a valid remedy but held that “[t]he right to a sale depends altogether upon statute, and will only be directed when the facts and circumstances required by statute to authorize it are affirmatively made to appear. The onus is always on him who seeks the sale.”¹⁹² Placing the burden of proof on the petitioner requesting sale reinforced the preference for partition in kind by transforming it into a rebuttable presumption.

The Supreme Court ruling in *Willard v. Willard*,¹⁹³ that the right to sale depended on statute, was interpreted by some courts to mean that jurisdiction over partition in kind was exclusively determined by statute.¹⁹⁴ Other courts attempted to establish an independent basis for partition completely distinct from statute. These held that, because partition had long been recognized as an action in equity, the statutes could not deprive a court of its inherent power in partition regardless of the nature of the remedy sought.¹⁹⁵ Still others held that “[t]he doctrine is now universally conceded, that courts of equity may exercise a general concurrent jurisdiction with courts of law in all partition cases.”¹⁹⁶ Concurrent jurisdiction existed “in cases of partition, whenever the remedy at law is insufficient, or peculiar circumstances render the proceeding in equity

190. In an action at law, the petitioner must satisfy the requirements of the statute authorizing sale. Once satisfied, however, the petitioner is entitled to the remedy sought. 59A AM. JUR. 2D *Partition* § 86, § 191 (2003).

191. See, e.g., *Cates v. Johnson*, 19 So. 416, 417 (Ala. 1896).

192. *Willard v. Willard*, 145 U.S. 116, 118-19 (1892). See also *Johnson v. Olmsted*, 49 Conn. 509, 518 (1882).

193. 145 U.S. at 118-119.

194. 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.21, at 95-96.

195. *Hess v. Voss*, 52 Ill. 472, 475 (1869), available at 1869 WL 5477, at *2; *Nance County v. Thomas*, 20 N.W.2d 925, 928 (Neb. 1945). But see *Copeland v. Giles*, 123 So. 2d 147, 148 (Ala. 1960) (affirming an order of private sale granted in response to a bill in equity seeking sale while simultaneously noting that “a court of equity in this state has no original or inherent jurisdiction to order the sale of lands for division among the joint owners; that the power to do so is statutory”). *Copeland* contradicts every attempt to categorize the diversity of statutes and holdings by jurisdiction: exclusively by statute, equity inherent in partition, or concurrent.

196. *Wright v. Marsh, Lee & Delavan*, 2 Greene 94, 105 (Iowa 1849), available at 1849 Iowa Sup. LEXIS 9, at *19-20. See also *Williams v. Coombs*, 33 A. 1073, 1074 (Me. 1895) (indicating that “this power [to decree a sale] will not be exercised whenever an actual partition is practicable . . .”).

more suitable and just.”¹⁹⁷ Concisely summarized, “[t]he jurisdiction of the court was threefold: (1) It was invested with all the cumulative and special powers created by the statute, (2) it retained all chancery attributes except as otherwise provided by the act, (3) it retained all its inherent common law authority so far as it could be exercised consistently with the two preceding powers.”¹⁹⁸ These different threads granting jurisdiction over partition actions defined the courts’ scope of authority. Thus those courts restricted by statute could offer only the remedies made available by statute. However, not all statutes attempted to proscribe the courts’ discretion and instead merely codified those powers that had existed inherently or at common law.¹⁹⁹ Those states recognizing either an independent, inherent power in equity or concurrent jurisdiction were not restricted by statute²⁰⁰ and could use the principles of equity to fashion a remedy otherwise unavailable at law or as required by the facts and circumstances.²⁰¹

Sale was a recognized remedy for partition actions under the common law by writ, by statutory action, or under a bill in chancery.²⁰² As stated previously, in most states the common law writ had been absorbed by statute, and the few states that retained the common law writ as a valid action at law treated the writ the same

197. *Clements v. Seaboard Air Line Ry. Co.*, 124 S.E. 516, 516 (Ga. 1924) (citing GA. CIVIL CODE § 5355 (1910)). Georgia Civil Code section 5506 went on to state, “[f]or every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other.” *Id.* See *Swogger v. Taylor*, 68 N.W.2d 376, 381 (Minn. 1955) (permitting a court to exercise its equitable powers to tailor a remedy to the particular facts and circumstances unrestricted by the specific provisions of the statute). See also *Croston v. Male*, 49 S.E. 136, 138 (W. Va. 1904) (allowing that “where the property is of such nature that the remedies of the law courts are inadequate to its recovery, equity supplies the defect by the use of its more diverse and flexible processes”).

198. *Wright*, 2 *Greene* at 106-07, available at 1849 Iowa Sup. LEXIS 9, at *20-22. See also *Swogger*, 68 N.W.2d at 381 (delineating the same three categories of interpretation).

199. See 2 *AMERICAN LAW OF PROPERTY*, *supra* note 98, § 6.21 n.6 and accompanying text, at 95-6.

200. *E.g.*, *Whitten v. Whitten*, 36 N.H. 326, 332 (1858) (stating that “the partition of real estate is an undoubted branch of equity jurisdiction”).

201. *Swogger*, 68 N.W.2d at 381 (establishing that courts of law had “full chancery powers enabling them to do complete justice according to the circumstances of each case”). One court based its determination that equity held jurisdiction for other reasons: “[t]he proceeding in equity is much more simple and convenient than that provided by the statute, which is rendered difficult and annoying by a great number of rigid rules as to details.” *Whitten*, 36 N.H. at 332.

202. *Loyd*, *supra* note 1, at 188-89.

as if it had been presented under the statute.²⁰³ Following its transition into courts of chancery shortly after the enactment of the Act of Henry VIII,²⁰⁴ the writ of partition was held to have acquired principles of equity.²⁰⁵ Thus the writ in American common law was subject to these same principles of equity.²⁰⁶ In those states that held that equity was inherent to an action for partition, it applied without reference to whether the petition was presented as an action at law or in equity.²⁰⁷ Generally, those states that maintained concurrent jurisdiction permitted the petitioner to request partition by sale in either a bill in chancery or as an action at law under the common law writ or statute.²⁰⁸ Thus no matter the form of the petition presented, whether the jurisdiction of the court was restricted by statute, derived independently or maintained concurrently, principles of equity applied to all actions for partition by sale.²⁰⁹

IV. PARTITION BY SALE

A. *Determining Whether Petitioner is Entitled to a Sale*

Although in some jurisdictions the absolute common law right of any co-tenant to demand partition was expanded to include partition by sale,²¹⁰ the majority of jurisdictions hold that the remedy

203. See *Hanson v. Willard*, 12 Me. 142 (Me. 1835). See also *Clements v. Seaboard Air-Line Ry. Co.*, 124 S.E. 516, 516 (Ga. 1924) (referring to GA. CIVIL CODE § 5358 (1910), which stated that the writ was the same as an action at law under the statute); *O'Brien v. Mahoney*, 60 N.E. 493 (Mass. 1901).

204. 31 Hen. 8, c. 1 (1539) (Eng.).

205. Loyd, *supra* note 1, at 171 (noting that the origins of equity in partition would be extremely difficult to ascertain).

206. *Clements*, 124 S.E. at 516.

207. See *Copeland v. Giles*, 123 So. 2d 147, 148 (Ala. 1960); *Cates v. Johnson*, 19 So. 416 (Ala. 1896); *Clements*, 124 S.E. at 516; *Rothert v. Rothert*, 441 N.E.2d 179 (Ill. 1982); *Pierce v. Pierce*, 123 N.E.2d 511 (Ill. 1954) (citing to the Partition Act of 1819, as revised, which abolished the common law writ and the statutory petition at law and established partition solely in chancery); *Mechling v. Meyers*, 120 N.E. 542 (Ill. 1918). See also *Wood v. Little*, 35 Me. 107, 111 (1853) (claiming that "[i]n England and many of the States, perhaps the most common mode of proceeding to procure partition is by bill in chancery . . . [and] [i]n these proceedings, the common practice is . . . to decree a sale of the whole estate and divide the proceeds").

208. See generally *Wright v. Marsh, Lee & Delavan*, 2 Greene 94 (Iowa 1849); *Wilson v. European & No. America R.R. Co.*, 62 Me. 112 (1873); *Hanson v. Willard*, 12 Me. 142, 146 (Me. 1835); *O'Brien*, 60 N.E. at 493; *Swogger v. Taylor*, 68 N.W.2d 376 (Minn. 1955).

209. *Wright*, 2 Greene at 105-07, available at 1849 Iowa Sup. LEXIS 9, at *19-22.

210. *Cates*, 19 So. at 417 (indicates that [p]artition or sale is a matter of right"). But see *Mylin v. King*, 35 So. 998, 998 (Ala. 1904) (accepting petitioner's amendment of a bill for partition which set forth "the facts relied on to show that the land was incapable of partition in kind, and therefore, a sale was necessary."). A co-tenant can force

of partition by sale becomes available only upon sufficient proof that the relevant facts and circumstances warrant a sale.²¹¹ The petitioner must show that partition in kind is impracticable,²¹² will cause great prejudice²¹³ or great inconvenience to the parties,²¹⁴ or that partition by sale is in the best interests of the parties.²¹⁵ Some courts interpret the inclusion of these standards to mean that the right to partition by sale becomes absolute if the petitioner presents evidence in satisfaction of the statutory standard.²¹⁶ However, the

partition by sale “only after proving the property cannot be equitably divided in kind.” ALA. CODE § 35-6-20, n.1 gen. consid. (1975 & repl. vol. 1991). Allowing a co-tenant to force a sale as of right raises federal and state constitutional issues of equal protection and due process of law. *Kluthe v. Hammerquist*, 188 N.W. 749, 750 (S.D. 1922) (addressing claims that statutes authorizing partition by sale are unconstitutional).

211. Generally, “the burden is on those who seek a sale of the property in lieu of partition in kind” to establish by a preponderance of the evidence the existence of a statutory ground for such sale. *Trowbridge v. Donner*, 40 N.W.2d 655, 660 (Neb. 1950), *reiterated in* *Phillips v. Phillips*, 104 N.W.2d 52, 56 (Neb. 1960). *See also* *Eaton v. Hackett*, 352 A.2d 748, 751 n.4 (Me. 1976); *Morse v. Morse*, 150 Me. 174, 178 (1954); *Morrill v. Morrill*, 5 N.H. 329, 331 (1831); *Maupin v. Opie*, 964 P.2d 1117, 1122 (Or. 1998); *Eli v. Eli*, 557 N.W.2d 405, 408-09 (S.D. 1997); *Blanchard v. Cross*, 123 A. 382, 384 (Vt. 1924).

212. *Mylin v. King*, 35 So. 998, 998 (Ala. 1904); *Rutherford v. Jones*, 14 Ga. 521 (1854), *available at* 1854 WL 1494, at *3; *Peck v. Peck*, 157 N.E.2d 249, 260 (Ill. 1959); *Hill v. Reno*, 112 Ill. 154, 163 (1883); *Hess v. Voss*, 52 Ill. 472, 472 (1869), *available at* 1869 WL 5477, at *1; *Bell v. Smith*, 71 S.W. 433, 434 (Ky. 1903); *Welch v. Zucco*, 665 So. 2d 697, 699 (La. Ct. App. 1995); *Tri-State Concrete Co. v. Stephens*, 395 So. 2d 894, 897 (La. Ct. App. 1981); *Eaton v. Hackett*, 352 A.2d 748, 752 (Me. 1976); *Williams v. Coombs*, 33 A. 1073, 1074 (Me. 1895); *Wood v. Little*, 35 Me. 107, 109 (1853); *Cauthorn v. Cauthorn*, 855 S.E.2d 256, 261 (Va. 1955).

213. *Peck v. Peck*, 157 N.E.2d 249, 286 (Ill. 1959); *Mechling v. Meyers*, 120 N.E. 542, 544 (Ill. 1918); *Rothert v. Rothert*, 441 N.E.2d 179, 182 (Ill. Ct. App. 1982); *Wood v. Little*, 35 Me. 107, 109, 112 (1853); *Codman v. Tinkham*, 32 Mass. 364, 365 (1834); *Swogger v. Taylor*, 68 N.W.2d 376, 384 (Minn. 1955); *Phillips v. Phillips*, 104 N.W.2d 52, 56 (Neb. 1960); *Trowbridge v. Donner*, 40 N.W.2d 655, 659 (Neb. 1950); *Kent v. Kent*, 835 P.2d 8, 10 (Nev. 1992); *Dall v. Confidence Silver Mining Co.*, 3 Nev. 531, 532 (1868), *available at* 1867 WL 2077, at *2; *Leavitt v. Benzing*, 82 A.2d 86, 87 (N.H. 1951); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N.D. 1984); *Kluthe v. Hammerquist*, 188 N.W.2d 405, 408 (N.D. 1922); *Maupin v. Opie*, 964 P.2d 1117, 1120 (Or. 1998); *Hurst v. Hall*, 574 P.2d 311, 312 (Or. 1978); *Haggerty v. Nobles*, 419 P.2d 9, 12 (Or. 1966); *Eli v. Eli*, 557 N.W.2d 405, 408 (S.D. 1997); *Leake v. Casati*, 363 S.E.2d 924, 926 (Va. 1988); *Croston v. Male*, 16 S.E. 136, 137 (W. Va. 1904).

214. *Tri-State Concrete Co.*, 345 So. 2d at 896; *Wilson v. European & N. America R.R. Co.*, 62 Me. 112, 112 (1873); *Wood*, 35 Me. at 112; *Leavitt*, 82 A.2d at 87; *Morrill*, 5 N.H. at 331; *Leake*, 363 S.E.2d at 926; *Cauthorn*, 85 S.E.2d at 259; *Blanchard*, 123 A. at 384; *Roberts v. Coleman*, 16 S.E. 482, 486 (W. Va. 1892); *Croston*, 49 S.E. at 137 (W. Va. 1904).

215. *See* CONN. GEN. STAT. § 52-500 (a) (1991) (authorizing “[a]ny court of equitable jurisdiction . . . [to] . . . order the sale of any property, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners.”).

216. *Nelson v. Hendricks*, 54 N.W.2d 324, 324 (S.D. 1952); *Kluthe v. Hammer-*

majority of state statutes do not restrict the extent of the courts' discretion in determining whether a petitioner is entitled to a sale.²¹⁷ The petitioner bears the burden of proof, but the court as the finder of fact makes the ultimate decision as to whether a sale is appropriate.²¹⁸ Courts consider a variety of facts and factors in making this determination.²¹⁹ However, neither the petitioner's preference nor the defendant's objections to partition by sale have any bearing on the process or the decision.²²⁰ Almost all state statutes require petitioners seeking partition to submit certain information, such as the names of all known owners, their title in the property, and a description of the property, to the court.²²¹ The statutes do not, however, specify what evidence is particularly rele-

quist, 188 N.W. 749, 750 (S.D. 1922); *Geis v. Vallazza*, 207 A.2d 248, 252 (Vt. 1965); *Blanchard*, 123 A. at 383; *Idema v. Comstock*, 110 N.W. 786, 787 (Wis. 1907).

217. Many statutes contain specific provisions or terms reserving discretionary power to the courts. *See* CONN. GEN. STAT. § 52-500 (1991) (permitting "[a]ny court of equitable jurisdiction [to] order the sale of any property, . . . when, in the opinion of the court, a sale will better promote the interests of the owners."). Some states appoint commissioners to make the determination of whether the land should be divided in kind or sold subject to court approval. The commissioners are granted similarly broad discretionary powers to provide a remedy within the statutory requirements. *See* ARIZ. REV. STAT. ANN. § 12-1218 (2002) (allowing the commissioners to submit a report recommending sale "[i]f the commissioners are of the opinion that fair and equitable division of the property . . . cannot be made . . ."); ARK. CODE ANN. § 18-60-420 (1987) (stating that "the court may, if satisfied that the [commissioners'] report is just and correct, make an order"); NEB. REV. STAT. § 25-2181 (2003) (authorizing the referee or referees to report to the court "[i]f it appears to the referee or referees that partition [in kind] cannot be made without great prejudice to the owners . . ."). *Cf.* OR. REV. STAT. § 105.245 (2001) (entitling the petitioner to a sale "[i]f it is alleged in the complaint and established by the evidence, or if it appears by the evidence to the satisfaction of the court without an allegation in the complaint; that the property . . . is so situated that partition cannot be made without great prejudice to the owners . . .").

218. 59A AM. JUR. 2D *Partition* § 185 (2003). *See also id.* §§ 186, 187 (2003) (establishing the standard of review of commissioners' reports as the same as an appellate court's review of a trial court's finding of facts).

219. *Id.* § 135 (2003) (delineating four factors that courts consider in deciding whether to order a sale: (1) quantity (2) quality (3) value, and (4) impairment in the value of the whole).

220. *Crocker v. Cotting*, 48 N.E. 1023, 1024 (Mass. 1898). *But see* *Reitmeier v. Kalinoski*, 631 F. Supp. 565, 575 (D. N.J. 1986) (noting that the remedy was appropriate because both parties requested partition).

221. *See* 735 ILL. COMP. STAT. ANN. 5/17-102 (West 1992); MASS. GEN. LAWS c. 241, § 6 (2000); NEB. REV. STAT. § 25-2171 (2003) (providing that all facts regarding owners and shares or interests, whether known or unknown, should be included in the petition); OR. REV. STAT. § 105.215 (2001) (stating the complaint must contain the interests of all owners, to the extent known); VT. STAT. ANN. § 5163 (2002) (requiring all three elements). *Cf.* CONN. GEN. STAT. § 52-502 (1991) (allowing the court to make an order to protect the interests of any unknown parties).

vant or admissible, or the weight to be given any facts or factors.²²² The absence of any specific provisions in the statutes substantiates the broad discretionary powers of the courts to mold a remedy according to the circumstances of each individual case.²²³

These statutory standards do not specify what is meant by impracticability, great prejudice, great inconvenience or the best interests of the parties. Impracticability is a commonly cited reason for not ordering partition in kind. Yet prior to the acceptance of the remedy of sale, impossibility was not a recognized reason to dismiss a suit for partition.²²⁴ In truth of fact, the early English courts were correct in ruling that all real property *could* be divided; the real problem lay in the results. Actual division often destroyed the property or greatly diminished its objective monetary value.²²⁵ Both parties, by failing to come to a voluntary agreement, were punished in their pocketbooks by the inequitable results of the remedy at law.²²⁶ Thus those statutes requiring the petitioner to prove that the parties will be "greatly prejudiced" or "greatly inconvenienced" by partition in kind are requiring proof that partition in kind will not provide any relief, the cure being more detrimental than the disease.

Over time, certain factors have emerged as particularly significant: the economic or fair market value of the land²²⁷ and the subjective value of the land relative to each of the parties in interest.²²⁸ Each owner has an economic interest in the land for its present fair market value and also in its future appreciation or speculative value.²²⁹ In addition, each party may have certain subjective interests in the land, such as feelings or sentiments that develop through

222. See 735 ILL. COMP. STAT. 5/17-108 (West 1992) (requiring that the commissioners consider the quantity and quality of the land when making allotments between the parties).

223. *Cauthorn v. Cauthorn*, 85 S.E.2d 256, 261 (Va. 1955).

224. *Hanson v. Willard*, 12 Me. 142, 146 (1835).

225. *Id.*

226. "If they would avoid the difficulty, they ought to agree to buy and sell." *Id.*

227. "The expression 'interests of the owners,' means pecuniary interest" *Johnson v. Olmsted*, 49 Conn. 509, 515 (1882). See also *Fike v. Sharer*, 571 P.2d 1252, 1254 (Or. 1977); *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 146 (Va. 1986).

228. *Eaton v. Hackett*, 352 A.2d 748, 750 (Me. 1976); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N.D. 1984).

229. See *Willard v. Willard*, 145 U.S. 116, 117, 120 (1892); *Johnson*, 49 Conn. at 509-10 (stating as facts in the record the present value of the defendant's investment, his receipts from the rental of the property over the preceding twenty-five years and the increase in value).

familial relationships, years of ownership or investments of labor.²³⁰ The court can assign an objective monetary value to each party's share by dividing the fair market value of the property according to each party's interest.²³¹ By contrast, it is quite difficult for a court to quantify each party's subjective value in the land.²³² Some courts have resolved the dilemma by quantifying the subjective value in monetary terms.²³³ The assumption is that the person who values the land the most will be willing to pay the most for it.²³⁴ Thus, to varying degrees, courts in almost every jurisdiction rely on the economic value of the land to determine whether partition in kind or partition by sale is the proper remedy.²³⁵

230. See, e.g., *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980) (reversing trial court's order for sale for failure "to give due consideration to the fact that one of the tenants in common has been in actual and exclusive possession of a portion of the property for a substantial period of time; that the tenant has made her home on the property; and that she derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years."); *Coxe v. Coxe*, 481 A.2d 86, 91 (Conn. App. Ct. 1984) (ordering partition in kind based on "the evidence [which] clearly established that the property has been owned by the defendant's family since 1924; that the defendant, her husband and her children had exclusive possession of the property since 1971 and that it served as their home; and that the defendant actively farmed a portion of the property for the subsistence and livelihood of her family."); *Eaton*, 352 A.2d at 752 (indicating that the defendant "wanted to retain part of [the property] because of her family's historical relation to it."); *Whiteley v. Whiteley*, 84 A. 68, 70 (Md. 1912) (noting that the appellee's "desire for the property was a sentimental one, because it had been his father's home . . ."); *Schnell*, 346 N.W.2d 713, 721 (N.D. 1984) (acknowledging defendant's "right to preserve the heritage of her labors, and the right to pass the property to her heirs.").

231. *Gaer Bros., Inc. v. Mott*, 161 A.2d 782, 784 (Conn. 1960); 59A AM. JUR. 2D *Partition* § 1 (1987) (citing *Michael v. Sphier*, 272 P. 902, 902 (Or. 1928)).

232. *Eaton*, 352 A.2d at 750 (determining that "a particular portion of a parcel of land might have a greater desirability to one party than to the other, for either financial, utilitarian or sentimental advantages."); *Kluthe v. Hammerquist*, 188 N.W. 749, 749 (S.D. 1922) (indicating that "two heirs ha[ve] a special interest in this tract of land aside from its ordinary sale value, and might become competitive bidders at a partition sale."). See also *Craig-Taylor*, *supra* note 61, at 768-69 (contending that "[a]n approach which focuses on economic efficiency may produce a more quantifiable, but not necessarily more equitable, result.").

233. "The economic valuation process reflects a hierarchy where market activity is implicitly privileged, and psychological and emotional components are undervalued." *Craig-Taylor*, *supra* note 61, at 769. See also *Eaton*, 352 A.2d at 750 (stating that, "in a particular case an attempt to place a precise monetary value on the property may not be helpful or essential to an equal division. Value . . . means the full range of the benefit the parties may be expected to derive from their ownership of their respective shares.").

234. "The values of co-owners who do not share these assumptions about value are marginalized. Their claims are deemed less worthy due to their failure to communicate their value in financial terms." *Craig-Taylor*, *supra* note 61, at 769.

235. *Rutherford v. Jones*, 14 Ga. 521 (1854), available at 1854 WL 1494, at *2; *Rothert v. Rothert*, 441 N.E.2d 179, 183 (Ill. 1982); *Hill v. Reno*, 112 Ill. 154, 162-63 (1883); *Welch v. Zucco*, 665 So. 2d 697, 699 (La. Ct. App. 1995); *Tri-State Concrete Co.*

There are two different formulations of the dominant test used by the courts to ascertain whether the interests of all of the parties will be promoted by a sale, or inversely stated, whether partition in kind will “prejudice” or “inconvenience” the parties. One asks “whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among the different parties and held in severalty, be materially less than the value of the same property if it be owned by one person;”²³⁶ the second, in more simplified terms, queries “whether the value of the share of each in case of partition [in kind] would be materially less than his share of the money equivalent that could probably be obtained for the whole.”²³⁷ Some states continue to acknowledge that land has subjective value to the parties in interest, and, although not easily quantified, that these subjective factors should be given some consideration.

This balancing act between the objective economic value and the subjective value of the land is an expression of the concurrent jurisdiction of law and equity in partition. Without America’s long history favoring partition in kind, the remedy of sale would dominate partition as it does in England.²³⁸ This is because it is more economically efficient for the parties and the courts to order a sale rather than wrangle with the specific facts and equities of each case.²³⁹ Once the court has determined each party’s share in the land and the fair market value, the land is sold at public or private auction and the proceeds are divided proportionally.²⁴⁰ The entire proceeding occurs objectively and as a matter of law.

v. Stephens, 395 So. 2d 894, 897 (La. Ct. App. 1981); Williams v. Coombs, 33 A. 1073, 1074 (Me. 1895); Whiteley v. Whiteley, 84 A. 68, 69 (Md. Ct. App. 1912); Phillips v. Phillips, 104 N.W.2d 52, 56 (Neb. 1960); Trowbridge v. Donner, 40 N.W.2d 655, 660 (Neb. 1950); Schnell v. Schnell, 346 N.W.2d 713, 716 (N.D. 1984).

236. Blanchard v. Cross, 123 A. 382, 384 (Vt. 1924); Croston v. Male, 49 S.E. 136, 139 (W. Va. 1904). But see Leake v. Casati, 363 S.E.2d 924, 927 (Va. 1988), quoting Sensabaugh v. Sensabaugh, 349 S.E. 141, 145-46 (Va. 1986) (deciding that “[e]ven evidence that the property would be less valuable if divided was held ‘insufficient to deprive a co-owner of his sacred right to property’”).

237. Phillips, 104 N.W.2d at 56; Trowbridge, 40 N.W.2d at 660; Leavitt v. Benzing, 82 A.2d 86, 87 (N.H. 1951), Fike v. Sharer, 57 P.2d 1252, 1254 (Or. 1977); Haggerty v. Nobles, 419 P.2d 9, 12 (Or. 1966); Johnson v. Hendrickson, 24 N.W.2d 914, 916 (S.D. 1946); Kluthe v. Hammerquist, 188 N.W. 749, 750 (S.D. 1922); Blanchard, 123 A. at 384; Idema v. Comstock, 110 N.W. 786, 787 (Wis. 1907).

238. See *supra* Part III.B. (discussing the status of partition by sale in England as compared to the United States).

239. But see Craig-Taylor, *supra* note 61, at 765-66.

240. 59A AM. JUR. 2D § 1(1987); 68 C.J.S. *Partition* § 2 (1988); 7 POWELL, *supra* note 94, § 50.07[1], at 50-37.

V. THE INHERENT CONFLICT AND RESOLVING THE TENSION

Co-tenancy contradicts one of the basic tenets of Anglo-American property law—that each owner has the right to possess, use and enjoy his land as he sees fit—by allowing multiple parties all of whom are possessed of the same rights to exercise those rights over one shared parcel of land.²⁴¹ Clearly, the actions of one party will infringe upon those of another and each will be constrained in his use of the land by the actions of the other co-tenants.²⁴² Partition solves this dilemma by severing the co-tenancy relationship. Thus the action for partition itself is remedial because it provides an alternative arrangement for co-tenants who can no longer agree on the best use of the commonly held land. The right to partition was established as absolute and available to all co-tenants regardless of their interest in the land.²⁴³ The right to partition is a necessary extension of the fundamental rights of possession, use and enjoyment in the context of common ownership²⁴⁴ and to force co-tenants to maintain that relationship would be to deny them the ability to exercise those rights freely. However, since neither party has superior title, both being possessed of the same rights, “[t]he only question is how can it [partition] best be made?”²⁴⁵ Where the court is restricted, as it is in Connecticut,²⁴⁶ to only two forms of relief, the requesting party’s “undeniable right to severalty in ownership shall be secured by the least injurious of the two specified modes.”²⁴⁷

A. *Origins of the Remedy of Sale*

The exact origins of partition by sale are unclear.²⁴⁸ However, the connections between payment of owelty and partition by sale cannot be ignored. Payment of owelty held, and continues to hold, an unusual position within the spectrum of available remedies.

241. 7 POWELL, *supra* note 94, § 50.07[1], at 50-14.

242. “Each co-tenant has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other co-tenants.” 7 POWELL *supra* note 94, § 50.07[1], at 50-37.

243. See *supra* notes 96-101 and accompanying text. See also 7 POWELL, *supra* note 94, § 50.07[3][a], at 50-41.

244. 7 POWELL, *supra* note 94, § 50.07[1], at 50-37 & § 50.07[3][a], at 50-41.

245. Richardson v. Monson, 23 Conn. 94, 96 (1854).

246. CONN. GEN. STAT. § 52-500. See *supra* note 7 (transcribing verbatim section 52-500 (a)). Cf. Fernandes v. Rodriguez, 761 A.2d 1283, 1287 (Conn. 2000).

247. Johnson v. Olmsted, 49 Conn. 509, 518 (1882).

248. Loyd, *supra* note 1, at 175 (indicating that the Partition Act of 1868 came from “the era of law reform.”).

Owerty was first used by courts of chancery to equalize actual divisions between coparceners.²⁴⁹ Following the enactment of the Act of Henry VIII in 1539,²⁵⁰ owerty was used concurrently with partition in kind as a remedy available to all co-tenants.²⁵¹ As part of the English common law, it was incorporated into statutes²⁵² and American common law.²⁵³ Owerty was used by some early courts²⁵⁴ to diminish the inequities of partition in kind where the court was not authorized to order a sale. In the twentieth century, courts have used partition with payment of owerty in a modified form.²⁵⁵

Statutes authorizing partition by sale act upon the right of any co-tenant to demand partition to remedy the evils of land rendered unmarketable and unproductive by common ownership.²⁵⁶ These statutes authorizing partition by sale are “purely remedial law[s], acting upon existing rights, and providing a remedy for existing evils”²⁵⁷ Although the right to demand partition was held to be absolute,²⁵⁸ American courts were willing to dismiss petitions for partition by sale where a superior claim in equity was presented.²⁵⁹ Thus the remedy of sale was grounded firmly in equity and would yield only to other equitable considerations.

249. See discussion *supra* Part III.A-B. & III.B. (discussing origins of owerty).

250. 31 Hen. 8, c. 1 (1539) (Eng.).

251. 31 Hen. 8, c. 1 (1539) (Eng.). See also 7 POWELL, *supra* note 94, § 50.09, at 50-54.

252. *Wilson v. European & Am. R.R. Co.*, 62 Me. 112, 112 (1873), available at 1873 WL 3171, at *1 (noting that ME. REV. STAT., c. 88, § 17 stated that “when any parcel of the estate to be divided is of greater value than either party’s share, and cannot be divided without great inconvenience, it may be assigned to one party by his paying the sum of money awarded to the parties who have less than their share.”); *Codman v. Tinkham*, 32 Mass. 364, 365-66 (1834) (citing statute of 1783, c. 41 § 2 allowing for owerty upon a petition for partition in order to equalize the shares, but holding that the statute does not authorize a court to set the entire parcel off to one party).

253. See *infra* note 280 and accompanying text (discussing the retention of owerty in Connecticut common law).

254. *Wilson*, 62 Me. at 113, available at 1873 WL 3171, at *1 (ordering partition by sale rather than owerty concluding “that one part owner of real estate cannot be compelled against his will to take more than his share of the estate, and to pay for the excess to the other part owners who have less than their share. He may do so, if he is willing; but the law will not compel him to do so against his will.”).

255. *Reitmeier v. Kalinoski*, 631 F. Supp. 565 (D. N.J. 1986) (allowing one party to retain full title and possession of the property with full monetary compensation paid to the other party, i.e. a private sale restricted to the co-tenants).

256. 7 POWELL, *supra* note 94, § 50.07[3][a], at 50-41.

257. *Id.*

258. See *supra* notes 87-89 and accompanying text (establishing the right to partition as absolute).

259. *Hayden v. Denslow*, 27 Conn. 335, 341-43 (1858).

B. *The Validity of the Remedy of Sale*

The validity of the statutes authorizing courts to order the judicial sale of land held in common was challenged in England and in America.²⁶⁰ Statutes in the United States authorizing partition by sale were not enacted until after the ratification of the Constitution.²⁶¹ The federal Constitution authorized states to regulate property and property rights provided such laws were consistent with the protection provided property owners against governmental interference under the Fifth and Fourteenth Amendments. The actual scope and definition of those rights were determined by state constitutions. A few cases raised constitutional claims.²⁶² In *Richardson v. Monson*, the plaintiff attempted to characterize the order of a sale as a governmental taking without the public purpose justification under the Fifth and Fourteenth Amendments.²⁶³ Courts rejected these claims and attempted to establish that the common law tradition of partition and the principles of equity, either inherent to an action for partition or within the jurisdiction of the court, authorized courts to order partition by sale.

C. *Balancing the Remedies and the Rights*

The ownership of land is the penultimate right in the Anglo-American legal tradition, a right of more ancient origin than the right to partition. Partition by its very nature both contradicts and confirms the fundamental principles of property ownership. The right of each co-tenant to use and enjoy the property is confirmed by the absolute nature of the right to partition. Yet the very act of effectuating that partition, regardless of the remedy, alters each owner's relationship to the land without his consent and despite any objections. Whereas partition in kind allows each co-tenant to maintain his or her ownership relationship with respect to a specific share of the land, partition by sale severs all relationships, legal and equitable, between the co-tenants and the land.²⁶⁴ Partition in kind

260. See *Johnson v. Olmsted*, 49 Conn. 509, 518 (1882); *Richardson v. Monson*, 23 Conn. 94, 97-98 (1854); *Murphy v. Murphy*, 175 N.E. 378, 379 (Ill. 1931) (summarily dismissing defendant's claim that he had "been deprived of his property without due process of law").

261. "A similar statute has existed and been regarded as constitutional, in the state of New York, since the year 1811." *Richardson*, 23 Conn. at 96.

262. See *Murphy*, 175 N.E. at 379 (summarily dismissing defendant's claim that he had "been deprived of his property without due process of law").

263. *Richardson*, 23 Conn. at 97.

264. See *supra* notes 93-97 and accompanying text.

provides a remedy by allowing each party to own a portion of the land in severalty without destroying his or her relationship to the land. Payment of owelty maintains the relationship because each party still receives a portion of the land, but one party is compensated with money for the lesser share received. Partition by sale, however, destroys the relationship of all the co-tenants to the land such that no one can use or enjoy the property as they are all divested of their ownership rights. Thus, the remedy of sale is an extreme exercise of judicial authority. Early courts recognized this and attempted to root the remedy of sale in the recognized legal principles of equity and property rights in order to justify its use.

Courts argued that the right to partition had been incorporated into the law of property as an incident of ownership in common.²⁶⁵ “[T]his right of partition enters into the very nature of the title of estates holden in common and is inseparable from them.”²⁶⁶ “The right of partition is incident to all real estate holden in common . . . and especially whenever it can not be otherwise enjoyed. The right of beneficial enjoyment . . . is as essential as the right of ownership.”²⁶⁷ Therefore, any person owning land in common was subject to this right and to the remedies necessary to give it effect. However, where sale deprives a party of ownership and possession in order to give partition effect, partition in kind and payment of owelty allows the interested parties to maintain ownership of a portion of the land, while compensating them monetarily for any minor inequities.

The action of partitioning land is, by its very nature, remedial. It provides a means of dissolving a co-tenancy that is restricting or preventing the parties in interest from exercising their rights of ownership. The corresponding remedies, therefore, must also be remedial; they must allow one party to recover for his or her loss or injury. Partition by sale is the more extreme remedy; therefore, the restrictive preference for partition in kind imposes a legitimate check on the balancing of private property interests and the public interest in alienable land. Private sales, due to their similarity to partition in kind accomplish the remedial purpose of partition while maintaining a proper balance between the parties’ interests such that any party who has not consented to the sale need not be de-

265. *Wood v. Little*, 35 Me. 107, 110 (1853) (noting that “[i]t is believed . . . that this right of partition is incident to the real estate held in joint tenancy or tenancy in common”).

266. *Richardson*, 23 Conn. at 97.

267. *Id.*

prived of his land against his will. He may participate in the private sale and the extent to which he values the land will be demonstrated by the amount he is willing to pay. In this manner subjective values may be represented in the sale, albeit in monetary terms.

VI. RESOLUTIONS AND REMEDIES IN *GIULIETTI*

Despite early Connecticut case law demonstrating adherence to the preference for partition in kind,²⁶⁸ partition by sale became a common remedy.²⁶⁹ Trial courts in particular found partition by sale more convenient because it tended to provide a final resolution.²⁷⁰ In 1980, however, the Connecticut Supreme Court re-affirmed its commitment to partition in kind through its decision in *Delfino v. Vealencis*,²⁷¹ reversing a superior court's decision ordering a partition by sale.²⁷² The court ordered the land divided in kind despite unique characteristics that made an equitable division difficult, if not impossible.²⁷³ The supreme court found the facts of the case determinative of the issue based on its own finding that neither of the two statutory grounds for sale, that partition in kind is either impracticable or inequitable or that a sale would better promote the interests of the parties,²⁷⁴ were present.²⁷⁵ The defendant inherited the land from her parents; she lived on the parcel and ran a business, her sole means of support, from that same piece of land.²⁷⁶ These facts contradicted any finding that it was "in the best interest" of the owners to order partition by sale because a sale

268. *Johnson v. Olmsted*, 49 Conn. 509, 517 (1882); *Kelley v. Madden*, 40 Conn. 274, 280 (1873); *Scovil v. Kennedy*, 14 Conn. 349, 353 (1841).

269. *Gaer Bros., Inc. v. Mott*, 161 A.2d 782, 785 (Conn. 1960); *Candee v. Candee*, 86 A. 758, 759-60 (Conn. 1913); *Johnson*, 49 Conn. at 518-19; *Richardson*, 23 Conn. at 98.

270. *Baucells & Lippman*, *supra* note 184, at 1234 (reiterating the opinion of Max Reicher, the retired superior court judge who was appointed judge trial referee on remand for *Delfino v. Vealencis*, 436 A.2d 27 (Conn. 1980)).

271. *Delfino*, 436 A.2d at 27.

272. *Id.* at 33.

273. *Id.* at 31 (discussing the trial court's finding that, "due to the situation and location of the parcel of land, the size and area of the property, the physical structure and appurtenances on the property, and other factors [primarily zoning issues], a physical partition of the property would not be feasible.")

274. *Id.* at 30.

275. *Id.* at 33 (stating that "[t]he trial court failed to give due consideration to the fact that one of the tenants in common has been in actual and exclusive possession of a portion of the property for a substantial period of time; that the tenant has made her home on the property; and that she derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years.").

276. *Id.*

would have deprived her of her inheritance, her house, and her business. Although the defendant was allowed to maintain possession of her house and business, on remand, she was required to pay owelty to compensate the plaintiff for the value of the land she retained in excess of her interest.²⁷⁷ Because partition in kind is often difficult to accomplish equitably, owelty can be used to adjust each party's share according to his or her legal interest or actual ownership of the property. A review of Connecticut partition cases reveals that Connecticut has retained use of owelty to make equitable adjustments in partition actions.²⁷⁸ It is only by virtue of the retained power to order owelty that the Connecticut courts can uphold the preference for partition in kind and yet also provide an equitable remedy.

The decision in *Delfino v. Vealencis*²⁷⁹ is important for two reasons. It has forced trial courts to scrutinize carefully the facts of each case to determine whether the party requesting a sale has satisfied both elements that partition in kind is impracticable or inequitable and that partition by sale would better promote the interests of the owners. It also demonstrates a willingness on the part of Connecticut's highest court to use its equitable powers in conjunction with the historical principles underlying partition to strike a balance between the right of a co-tenant to sever his interest in the property and the court's obligation to uphold the fundamental tenets of property ownership.

In *Fernandes v. Rodriguez*,²⁸⁰ the Connecticut Supreme Court reversed and remanded a decision by the appellate court ordering the defendant to transfer his interest in the joint property to the plaintiff in exchange for a payment of owelty by the plaintiff.²⁸¹

277. Baucells & Lippman, *supra* note 184, at 1234-35.

278. *Fernandes v. Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000) (holding that a court may "award money damages if an order of partition in kind results in minor inequities" (citing 7 POWELL, *supra* note 94, § 50.07 (3)(a), (4) & (5))); *Johnson v. Olmsted*, 49 Conn. 509, 519 (1882) (noting that "as the money is to stand for the land, the court can make all necessary orders for the protection of his rights . . ."); *Kelley v. Madden*, 40 Conn. 274, 280 (1873) (ordering partition in kind based on accounting rather than strictly on parties' legal title); *Scovil v. Kennedy*, 14 Conn. 349, 354 (1841) (asserting that "the powers of the court are adequate to a full and just compensatory adjustment"); *Filipetti v. Filipetti*, 479 A.2d 1229, 1231 (Conn. App. Ct. 1984) (holding that "[t]he court has the power and authority to order such payments to facilitate an equitable and fair division" (citing 4A POWELL, *supra* note 94, § 612; 2 AMERICAN LAW OF PROPERTY, *supra* note 98, § 6.26)).

279. *Delfino*, 436 A.2d at 27 (Conn. 1980).

280. 761 A.2d 1283 (Conn. 2000).

281. *Id.* at 1286 n.4.

The supreme court held that a trial court may award damages to adjust an inequitable division in kind; however, a court may not order one party to transfer title to another.²⁸² Thus, a trial court in an action for partition may not deprive one party of his interest in the property by ordering one party to sell his interest to the other.²⁸³ Generally, a court may require only such payments where both parties have retained an interest in the land.²⁸⁴ Although this demarcation appears to be a distinction without a difference, it reveals the Connecticut Supreme Court's adherence to the well-developed body of law pertaining to partition actions.²⁸⁵ The court, in *Fernandes*, carefully noted that the statute allowing for partition in kind dates back to 1720, and the statute authorizing partition by sale similarly dates back to 1844 with minimal changes in the language of either.²⁸⁶

On the basis of the history of the right to partition, and in light of the legislative treatment of that right, we have held repeatedly that in resolving partition actions, the *only* two modes of relief within the power of the court are partition by division of real estate and partition by sale.²⁸⁷

Neither the language of the statute nor the powers of equity inherent in an action for partition permit a trial court to "substitut[e] its own ideas of what might be a wise provision in place of a clear expression of legislative will."²⁸⁸ "[A]lthough the trial court is responsible for promoting the best interests of the parties, that consideration does not afford the trial court with latitude beyond the two modes of partition provided by the legislature."²⁸⁹ Thus, in *Fernandes*, the Connecticut Supreme Court curtailed any attempts to expand the limited remedies available in a partition action and by doing so restricted the lower court's authority to exercise its equitable powers in fashioning a remedy in an action for partition.

Following the decision in *Fernandes*, the superior court's equi-

282. *Id.* at 1286.

283. *Id.* at 1287-88.

284. *See* *Reitmeier v. Kalinoski*, 631 F. Supp. 565, 577-78 (D. N.J. 1986) (citing 68 C.J.S. *Partition* § 142 (1985)).

285. *Fernandes*, 761 A.2d at 1289 (stating that the "decision in the present case is governed by statutes . . . that have been construed previously by this court in light of their history, language and apparent purpose").

286. *Id.* at 1288-89 (noting that the "decision in the present case is governed by statutes that have been 'on the books' for a very long time . . .").

287. *Id.*

288. *Id.* at 1289.

289. *Id.*

table powers in fashioning a remedy in furtherance of the “best interests of the parties” were circumscribed by the “clear expression of legislative will”²⁹⁰ contained in section 52-500 of the Connecticut General Statutes and the long history of cases allowing for only two modes of relief.²⁹¹ There is no provision in section 52-500 authorizing superior courts to order partition by *private* sale whereas section 45a-164 permits probate courts to order a public or private sale in their discretion.²⁹² The specificity of the language in section 45a-164 precludes the presumption that the term “sale” in section 52-500 includes both public and private sales. However, unlike the seemingly improvised remedy in *Fernandes*,²⁹³ the decision in *Giulietti* does not involve the substitution or creation of a remedy; instead, a court of superior jurisdiction used a parallel statute to reach a result consistent with that of the court which had primary subject matter jurisdiction.²⁹⁴ Although it appears that the decision in *Giulietti* expands the remedies available in partition actions and thereby expands the authority of the court to exercise its equitable powers in providing a remedy, the superior court’s use of probate statute section 45a-164 is based entirely on the facts presented. By grounding the *Giulietti*²⁹⁵ decision in the facts, the appellate court maintained the preference for partition in kind, recently revived in *Delfino*,²⁹⁶ and avoided affirming a decision that would directly contradict the narrow statutory construction and limiting judicial history forcefully reiterated in *Fernandes*.²⁹⁷

The decision in *Giulietti v. Giulietti*²⁹⁸ attempts to reconcile the holdings in *Delfino* and *Fernandes* as applied to the unique facts and circumstances presented. Following the *Delfino* approach, the appellate court focused on the facts of the case in order to determine what was in the best interests of the parties.²⁹⁹ Although a substantial body of authority existed granting the superior court the authority to use the broad equitable powers inherent in action for

290. *Id.*

291. *Id.* at 1287.

292. *See supra* notes 7, 54 (containing the language of Connecticut General Statutes sections 52-500(a) and 45a-164(a), respectively).

293. *Id.* at 1289 (holding that the remedy provided by the trial court and affirmed by the appellate court was not “legally permissible”).

294. *See supra* notes 7, 53, & 54 (containing Connecticut General Statutes sections 52-500(a), 45a-166(a) and 45a-164(a), respectively).

295. 784 A.2d 905 (Conn. App. Ct. 2001).

296. 436 A.2d 27 (Conn. 1980).

297. 761 A.2d at 1283.

298. 784 A.2d at 905.

299. *Id.* at 936-37.

partition, the court refused to expand its powers and the remedies available to it beyond the scope of the legislative mandate contained in section 52-500.³⁰⁰ It is precisely this inherent power of equity in an action for partition that forces the appellate court to ground its decision in the unusual facts presented and the historical preference for partition in kind. Without these parameters, superior courts would be free to exercise that inherent power to mold an equitable remedy thereby diminishing the value of precedent in actions for partition, disrupting all efforts to achieve consistent results for similar cases and threatening the stability that both maintain with respect to property ownership and property rights.

CONCLUSION

Neither the superior court decision nor the appellate court decision highlights the absence of specific statutory authority to order a private sale. Both opinions delve into statutory construction, legislative history, and precedent under Connecticut General Statutes section 52-500 and then move almost seamlessly into the corresponding probate statute, section 45a-164, relying on the unusual facts in *Giulietti* to provide the rationale. This careful construction emphasizes the recent developments of the action of partition in Connecticut law following the decision in *Delfino*. The re-affirmation of the preference for partition in kind in Connecticut law stands in marked contrast to the evolution of partition actions in the United States. As discussed in sections IV and VI, partition by sale never became the preferred remedy but has been used with increasing frequency due to concerns over efficiency, land valuation, and equal distribution. Although the *Giulietti* decision maintains that preference for partition in kind without resorting to an impermissible extension of remedies as in *Fernandes*, the decision does not clarify the current status of partition or the exact remedies available in Connecticut.

The Connecticut Supreme Court's decision in *Delfino* altered the course of partition actions in Connecticut by reinstating the legal presumption favoring partition in kind. Just as the decision in *Fernandes* limited the scope of the decision in *Delfino* by preventing a superior court from ordering the transfer of title as a payment of owelty, so too does the decision in *Giulietti*. The preference for partition in kind must yield to the interests of equity, which demanded that Attorney Giulietti be deprived of his share in the fam-

300. CONN. GEN. STAT. §52-500. See *supra* note 7.

ily land. Thus it is clear that while the preference for partition in kind expresses a valued tenet of public policy, equity is a fundamental principle of partition in Connecticut jurisprudence. Given that the decision in *Giulietti* relies heavily on the facts, it seems highly unlikely that superior courts will be able to order private sales in actions for partition unless remarkably similar facts dictate a similar result. Thus, *Giulietti* provides minimal precedential value in terms of expanding or redefining the available remedies. It does, however, reinforce the role of equity inherent in all partition actions in the same manner that *Delfino* re-affirmed the codified preference for partition in kind.

The Connecticut appellate courts, in *Delfino*, *Fernandes*, and *Giulietti* have maintained the more traditional interpretation of partition and restricted the remedies to partition in kind, owelty, and partition by sale. The law on partition in Connecticut is merely framed by these watershed cases; it is the accumulation of cases at the trial level that provides the substantive precedents and to which most practitioners will turn in pursuing an action for partition.

Gillian K. Bearns